Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

E. JEAN JOHNSON and BASILIO FONTANA,

Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a federal court case involving claims under the *Labor Management Reporting and Disclosure Act* (hereinafter "LMRDA") (29 U.S.C. section 411(a)(5)) the Ninth Circuit District Court of Appeals did not reach the issue whether the National Association of Letter Carriers, AFL-CIO (hereinafter "NALC AFL-CIO") violated the procedural due process rights guaranteed to union members under the LMRDA and the Constitution of the NACL AFL-CIO (hereinafter "NALC Constitution) by failing to respond to union members' appeals from disciplinary action taken by defendant NALC Branch 1100. The Court of Appeals stated this issue was raised by the union members "for the first time on appeal." The questions presented are:

1. The Ninth Circuit District Court of Appeals erred in holding that an issue raised in the district court in the complaint, in the oppositions to motion for summary judgment, in the oral argument and recognized in the district court order was not sufficient to preserve that issue for decision on appeal.

2. Whether the NALC AFL-CIO, a national union, violated the due process rights guaranteed union members under the LMRDA by completely failing to respond to the union members' appeals when a response to such appeals is required by the NALC Constitution thus giving the union members the right to directly sue that national union.

LIST OF PARTIES

Petitioners:

E. Jean Johnson

Basilio Fontana

Respondent:

National Association of Letter Carriers, AFL-CIO

Other Defendants in District Court Appeal:

National Association of letter Carriers, Branch 1100

Arthur Turner
William Heintz
John Wellen
Howard Kashinsky
John Jackson
Charles Miller
Thomas Coladonato
Kirk Baiz
Richard Misner
Norberta Fullen
Bonnie Lippincott
Richard Felde
Bruce MacDuffee
Michael Rotcher
Barbara Stickler

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PETITION FOR WRIT OF CERTIORARI

Petitioners E. Jean Johnson and Basilio Fontana respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 2, 1999.

OPINIONS AND ORDERS BELOW

The May 13 and May 2, 1997 Orders of the district court are unreported. They are reproduced in the appendix (hereinafter cited as "App."), App. 9 through 25; App. 26 through 50. The July 2, 1999 memorandum of the United States Court of appeals for the Ninth Circuit addressing the NALC's failure to respond to Petitioners' appeals is unreported and is reproduced at App. 1 through 8. The July 2, 1999 opinion of the United States Court of Appeals for the Ninth Circuit finding the charges upon which the local branch based the discipline of Fontana and Johnson were not specific as required by the LMRDA is reported and is reproduced at App. 51 through 64. The December, 1997 hearing transcript of argument before the Ninth Circuit Court of Appeals is unreported and is reproduced at App. 65 through 83.

JURISDICTION

A petition for rehearing before the Court of Appeals was not made by the Petitioners. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. section 411, Labor Management Reporting and Disclosure Act, Subchapter II – Bill of Rights of Members of Labor Organizations, is reproduced in the Appendix. (App. 84-87)

STATEMENT OF THE CASE

Plaintiffs E. Jean Johnson and Basilio Fontana invoked the federal district court's jurisdiction under 29 U.S.C. section 411 (The Labor Management Reporting and Disclosure Act) (LMRDA).

On June 6, 1994 and May 10, 1994, E. Jean Johnson and Basilio Fontana, respectively, filed complaints against NALC Branch 1100, NALC AFL-CIO and certain named individuals who were Branch officers and trustees for violations of plaintiffs' due process and free speech rights guaranteed under the LMRDA. State causes of action for breach of contract, defamation, conspiracy, denial of overtime and denial of earned leave were also included in the complaints. (Appellee NALC's Supplemental Excerpts of Record (SER) at p. 1 and p. 42.)[1]

On May 13, 1997 and May 2, 1997 the federal district court entered orders based on motions for summary judgment in favor of all defendants against both plaintiffs dismissing the entirety of plaintiffs' cases. (App. 9, 26.) Plaintiffs appealed both judgments to the Ninth Circuit

[1] Reference to SER is Supplemental Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals.

District Court of Appeals timely. Oral argument was heard on December 11, 1998. The Ninth Circuit published one opinion reversing in part the district court's grant of summary judgment in favor of defendant Branch 1100 only and dismissed defendant NALC AFL-CIO. (App. 51.) In that published opinion, the court of appeals stated that the charges upon which the local branch of the NALC AFL-CIO disciplined Johnson and Fontana were not specific as required by the LMRDA. (Plaintiffs contend that the national union is equally subject to the LMRDA requirements of specificity of charges as is any union branch when appeal regarding that issue is taken to the national union as it was in this case.) Those particular charges were the charges made by Michael Rotcher and Bruce MacDuffee against both plaintiffs. (The court of appeals also found that Felde charges, which were overruled by the national union upon appeal by plaintiffs, were also fatally non-specific.) (App. 64, 61 fn 7.)

The court of appeals decided not to reach the issue of defendant NALC AFL-CIO's failure to respond to plaintiffs' final appeals from the discipline of expulsion imposed by the local upon plaintiffs based on the Rotcher and MacDuffee charges, leaving plaintiffs in an expelled status, that plaintiffs request this Court to address. (App. 7.)

Both Johnson and Fontana were NALC Branch 1100 union officers when the other officers decided to "take over" the branch by engaging in a lengthy and concentrated effort to not only remove Johnson and Fontana as elected officers, but get them expelled from the union, which essentially equates to a death sentence to a union

member. Expulsion was important to the "take-over" officers because, as expelled members, neither Johnson nor Fontana could run for office in the next election. During the course of events carried out by the other union officers, members of the board of trustees and other members at large, the rights guaranteed by law and the union constitution to Johnson and Fontana were denied them. (App. 84 through 87; App. 88, 89.)

Three members at large, Richard Felde, Michael Rotcher and Bruce MacDuffee each wrote letters of charges against both Johnson and Fontana (three letters to Johnson and three letters to Fontana). (Johnson ER at p. 497, 498, 499, 500; Fontana ER at p. 256, 264, 265, 301.)[2] The non-specific charges alleged by Richard Felde were brought before the membership for a vote to suspend Johnson and Fontana on September 14, 1993. Both Johnson and Fontana were suspended from membership. (Fontana ER, p. 340, 341, 342.) Both Johnson and Fontana appealed the suspensions to the NALC AFL-CIO as provided under Article 11, Sec. 4(a) "Committee on Appeals" in the NALC Constitution. (Fontana ER, p. 492; Johnson ER, p. 404.) (App. 88, 89.) The Committee on Appeals responded only to the appeals of Johnson and Fontana regarding the suspensions based on the Felde charges by letter dated November 10, 1993. This decision overruling the branch's suspension of plaintiffs' membership based on the Felde charges stated that any member has the right to file charges against other union members. (Appellee

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[2] Reference to ER is Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals.

NALC's SER at p. 829, 830, 831, 832.) The NALC AFL-CIO Committee on Appeals' response did not address the plaintiffs claims of denial of due process raised by Johnson and Fontana in their appeals from the suspensions based on the flawed Felde charges. (Appellee NALC's SER at p. 657, 663, 664 and p. 710.) The court of appeals ultimately disagreed with the union (which did not address specificity even though it was appealed) and the federal district court (which held the charges were sufficiently specific) by ruling all the charges made by Felde, Rotcher, MacDuffee were **not** specific as required by the LMRDA and thus denied Johnson and Fontana guaranteed due process. (App. 64.)[3]

On October 7, 1993, the union membership, based on the MacDuffee charges, again suspended Johnson and Fontana and **then expelled** both Johnson and Fontana based on the Rotcher charges. (Fontana ER at p. 133, 135.) On October 26, 1993, Johnson and Fontana each submitted two (2) appeals (appealing the suspensions of both based on the MacDuffee charges and appealing the expulsions of both based on the Rotcher charges) to NALC AFL-CIO via the Branch 1100 secretary/treasurer. (Johnson ER at p. 420, 427; Fontana ER at p. 275, 305.) On

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[3] It must be noted here that the national Committee on Appeals' response to plaintiff's appeals from the Felde charges was received before plaintiff's October 26, 1993 appeals on the Rotcher and MacDuffee charges were sent to the national Committee on Appeals. The October 26, 1993 appeals were sent to the national union by the branch along with the branch's opposition to the appeals on November 29, 1993.

November 29, 1993, the branch mailed Johnson and Fontana's appeals along with its response to the NALC Committee on Appeals as is the normal procedure. (Johnson ER at p. 420, 427; Fontana ER at 293, 329.) It is from these four (4) October 26, 1993 (Rotcher and MacDuffee) appeals that Johnson and Fontana never received a response from the Committee on Appeals.

Defendant NALC AFL-CIO admits that it never responded to those appeals. (App. 69, 70.) This left Johnson and Fontana expelled as union members. Expelled union members cannot hold office. *Falcone v. Dantinne,* 420 F.2d 1157, 1159 fn 2.) (Johnson ER at p. 301, Sec. 7.) At the time of the expulsion, Johnson was Fourth Vice President which was a full-time job with excellent compensation and benefits and Fontana lost the opportunity to run for office at the next election.

Plaintiffs alleged in both the complaint and oppositions to the defendants' motions for summary judgment that the NALC AFL-CIO violated their rights to procedural due process by failing to respond to their October 26th appeals (Rotcher and MacDuffee). (Appellee NALC's SER at [complaint] p. 47, 57-58, 76; [oppositions] 868-869, 871-872, 911, 914-915.) (App. 23.) Plaintiffs' counsel argued this issue during oral argument at the summary judgment motion hearing. (Johnson ER at p. 11, Federal District Court Docket Number 54 under case number 94CV3765, Transcript of Motion Hearing Before the Honorable Consuelo B. Marshall dated Tuesday, November 26, 1996, p. 66, 67, 68, 69, 70, 71.) The district court acknowledged the issue of a violation of due process by national NALC AFL-CIO's failure to respond to the appeals, but did not discuss it. (App. 23.) The court of

appeals erred in declining to address the issue of violation of procedural due process by the national NALC AFL-CIO for failing to respond to plaintiffs' October 26th appeals as a result of their expulsion. The court of appeals erroneously ruled that this issue was raised for the first time on appeal, and therefore, did not reach the issue. (App. 7.) The appeals court dismissed defendant NALC AFL-CIO entirely from the lawsuit and plaintiffs' were ordered to pay defendant NALC AFL-CIO's costs. (App. 64.)

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES THE UNRESOLVED RIGHT PROVIDED TO ALL UNION MEMBERS BY THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT THAT NATIONAL UNIONS ARE REQUIRED TO FOLLOW THEIR OWN CONSTITUTIONS WHEN THOSE CONSTITUTIONS PROVIDE DUE PROCESS COVERED BY THE ACT

A. Resolution of This Issue Effects Every Union Member of the National Association of Letter Carriers and All Members of Other National Unions That Guarantee Their Members Due Process Through An Appeals Process.

The NALC Constitution provides:

> "Sec. 4(a) The Vice President, Secretary-Treasurer, and Chairman of the Board of Trustees shall constitute the Committee on Appeals. They shall examine all appeals and grievances that may arise in the National Association, and all appeals and grievances that may be taken from a State Association, or from a Branch to the

> National Association, or between individual members thereof, except those involving questions of law upon which the National President has ruled, as may be referred to them in accordance with the laws of this Association. They shall notify the appropriate Branches, State Associations, the appellant, and the President of their decision. They shall make a written report summarizing their activities at each National Convention." (App. 88, 89.)

Accordingly, the NALC AFL-CIO's own constitution commanded the NALC Committee on Appeals to respond to all appeals made by NALC union members to its Committee on Appeals. It is undisputed in this case that the NALC AFL-CIO did not respond to plaintiffs' October 26, 1993 appeals from the discipline of expulsion and suspension based on the Rotcher and MacDuffee charges. (App. 69, 70) Plaintiffs were left with no recourse or remedy except to sue the Branch and try to sue the national.

The evidence consists of the testimony of the plaintiffs, the testimony of individual branch 1100 defendants and the admissions by NALC AFL-CIO's defense counsel in oral argument before both the district court and the court of appeals. In failing to respond, the national allowed the branch to carry out its illegal expulsion of plaintiffs from the union. (Fontana ER at p. 133, 135.)

The history behind the Labor Management Reporting and Disclosure Act explains the purpose for the act. Congress intended to protect union members from the abuses that could be perpetrated upon them by union officers and union hierarchy. (*Reed v. United Transportation Union*, 488 U.S. 319, 325-326 (1989). It has become evident that

the NALC national is not held accountable for the very constitution it drafts for the alleged benefit of each and every working union member from whom it collects significant dues. The national governance of the NALC takes in all of the dues money from its members working for the Postal Service. The entire amount of dues is sent directly to the NALC AFL-CIO headquarters in Washington, D.C. by the Postal Service. The NALC AFL-CIO then sends, after subtracting its share, the divided monies to the local branches and to the state NALC. (Fontana ER at p. 384, Art. 7 Sec. 2(a) & 2(b.) Although the national collects substantial amounts of dues from the working members, it has, in effect, insulated itself so that it is not accountable to a single union member. (App. 90)

The expulsion of plaintiffs Johnson and Fontana from the NALC union was the result of illegal conduct by the defendant branch officers and membership. [The Ninth Circuit Court of Appeals determined that the Felde, Rotcher and MacDuffee charge letters were not specific as required by the LMRDA section 411(a)(5) and that prejudice to Johnson and Fontana was inherent because of the lack of factual detail. (App. 60, 61, 62, 63, 64.)] Appeal to the national NALC AFL-CIO by plaintiffs for this illegal conduct was provided by the NALC constitution and required by the LMRDA, section 411(a)(4) for plaintiffs to exhaust their administrative remedy. (App. 86.) The NALC Constitution requires the Committee on Appeals to respond to all appeals and grievances submitted. However, in this case, the Committee on Appeals simply did not respond to the October 26, 1993 appeals from the branch action on the Rotcher and MacDuffee charges. Plaintiffs and defendant Branch 1100 never received any

communication from the NALC AFL-CIO Committee on Appeals regarding those October 26th appeals (Rotcher and MacDuffee). (App. 69; Johnson ER, p. 11, Federal District Court Docket Number 53 Under Case Number 94CV3765, Transcript of Motion Hearing Before the Honorable Consuelo B. Marshall dated Wednesday, November 20, 1996, p. 32.) The branch, undeterred, carried out the discipline it had imposed on plaintiffs which was another suspension (the suspension based on the Felde charges had been overturned) and **expulsion** from union membership. (Fontana ER at p. 133, 135.) Plaintiff Johnson permanently lost her employment as Fourth Vice President due to the complete failure of the NALC AFL-CIO to respond to the October 26th appeals. Plaintiff Fontana was deprived of any opportunity to again run for office.

The court in *Falcone v. Dantinne*, 420 F.2d 1157, 1163, (3rd Cir. 1969) recognized that many unions, which includes the NALC AFL-CIO, have initiated retirement and medical plans. This means that expulsion from the union would result in the loss of these valuable benefits and therefore, to the typical union member, the maintenance of his/her membership is of paramount importance. *Falcone, Id.* at 1163. The plaintiffs, who stand in the shoes of all NALC union members, present an issue which applies to over 300,000 postal letter carriers who are members of NALC AFL-CIO. (Appellee NALC's SER at p. 363.) (App. 9) Millions of Americans are members of labor unions and the welfare of many of thee Americans depends upon whether they can maintain their union membership. *Falcone v. Dantinne*, 420 F.2d 1157, 1163 (3rd Cir. 1969).

Union members, justifiably, expect their unions to be subject to and act in conformity with the law, in this case, the LMRDA. The national NALC AFL-CIO must be held accountable for failure to follow its own created constitution. Employers and corporations are held accountable for their failure to follow their own created policies and procedures. (*Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 447 n 2 (1980).) The similarity of circumstances are sufficient to compare the accountability in that employees have a special relationship with their employers who make certain promises providing procedural due process and fair treatment to their employees while the national union promises similar due process rights via its constitution to its union members. The NALC AFL-CIO is ordered by statute, the LMRDA, to guarantee this due process right to its union members. National unions, including the NALC AFL-CIO, must be held accountable for provisions in their constitutions providing this statutory requirement to its members. This is especially so since the NALC member is **required by the LMRDA to exhaust the administrative remedies** provided and hopefully adhered to by the branches and the national NALC AFL-CIO. Although LMRDA section 411(a) creates personal rights, a union member vindicating those rights also serves public goals, in that he "necessarily renders a substantial service to his union as an institution and to all of its members," contributing to the improvement of preservation of democracy within the union. *Reed v. United Transportation Union*, 488 U.S. 319, 325-326 (1989). Accountability of the national unions is demanded by the LMRDA for violation of procedural due process. Constitutions of national unions that guarantee

required review of appeals for violation of procedural due process claims by union members cannot be ignored and failure to respond to the union member is a serious violation. This is exactly what occurred in this case to plaintiffs Johnson and Fontana. The most important appeal, the one appealing the branch action expelling them from the union was totally ignored by the national Committee on Appeals.

An additional complication created by the failure to respond is that by not acting, i.e. not responding to an appeal, entirely relieves the national union of any liability for that failure. By not responding, the national NALC AFL-CIO is "off the hook". Since it apparently takes an affirmative action to have ratification of the conduct of the branch by the national governance, by simply refusing to act at all protects the national. (See *Rodonich v. Housing Wreckers Union Local 95*, 817 F.2d 967, 973 (2nd Cir. 1987). The NALC constitution outlines what is required to hold the national NALC liable:

> "Sec. 2. Neither the National Association nor any of its officers shall be responsible or liable for the wrongful or unlawful acts of any Branch or State Association, or officers, members, or agents thereof, except where the National Association or its officers have actually participated in or actually authorized such acts, or have ratified such acts after actual knowledge thereof." (App. 90.)

The standard for the ratification element necessary to hold the national accountable is unrealistic and all but impossible for the union member in light of the circumstances of the first-line union member position in the

union hierarchy. The union member undoubtedly has no contact whatsoever with the national governance except to send up an appeal, believing it will be addressed and responded to after full examination and fair application. If the national NALC never responds to an appeal made by a member as required, the national has effectively avoided accountability for its violation of that member's rights as guaranteed under the LMRDA.

The union member, who has contributed to the financial wealth of the national union, is left effectively with no avenue to enforce the statute created for the preservation of each union member's rights. Power to impose discipline may rest with the local branch, but the national, as in the instant case, is the overseer and has provided a course of last resort for every union member to appeal any imposition of discipline. The union member must have available recourse to hold the national responsible for its statutory obligation for failure to respond to his/her appeals.

B. Should the Court of Appeals Have Addressed the Issue of Violation of Procedural Due Process Under the LMRDA by the National Union Because the District Court Did Have the Opportunity to Address the Issue But Did Not.

In its unpublished opinion, the Ninth Circuit Court of Appeals wrote the following under the heading "Due Process Claims":

> "*E. Failure to Respond to Fontana and Johnson's Appeals* Fontana and Johnson argue that the NALC breached the LMRDA and the NALC Constitution by failing to respond to their

> appeals of their convictions on the Rotcher and MacDuffee charges. We do not reach this claim because Fontana and Johnson raise it for the first time on appeal. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1205-06 (9th Cir.) *cert. denied*, 119 S. Ct. 444 (1998). In their complaints, Fontana and Johnson only allege that the NALC was liable because it ratified the Branch's actions. Fontana and Johnson's papers in opposition to the NALC's motion for summary judgment likewise include no such claims." (App. 7.)

The *Nelson* case cited by the Court of Appeals essentially states:

> "Despite the plaintiff's failure to raise this claim below, Nelson asks this court to consider it. We must exercise our discretion to decide whether to consider an issue raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). "Except in the case of jurisdictional questions or where particular circumstances indicate that injustices might otherwise result or where public policy requires, this Court declines to consider arguments for reversal not presented to the district court." *In re U.S. Financial Inc.*, 594 F.2d 1275, 1282 (9th Cir. 1979).

There is no "bright line rule" for determining whether a matter has been properly raised below. "A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir.

1992). As will be shown, the matter of violation of procedural due process guaranteed under the LMRDA against the national NALC AFL-CIO for failing to respond to plaintiffs' appeals was sufficiently raised to the district court below. Even though the district court raised the issue in its order, evidencing that plaintiffs did raise the issue, it did not rule on the raised issue. (App. 23.)

Under the Federal rules, a complaint is sufficient with "notice" pleading, i.e. "a short and plain statement of the showing that the pleader is entitled to relief". (*Federal Rules of Civil Procedure* 8(a)(2)) It is not required that every fact or set of facts supporting a cause of action be outlined in detail in the complaint. With that in mind, one need only look at Johnson's complaint to find the allegation of violation of procedural due process by NALC for failing to respond to her appeals. (Appellant NALC's SER at p. 47, 57-58, 76.) The allegation was addressed under the breach of contract claim and included via paragraph reference in her violation of procedural due process claim. Even though the allegation was not defined in Fontana's complaint, as will be seen, the district court addressed the issue in its ruling on motion for summary judgment against Fontana. The court of appeals chose to consolidate the two cases. (App. 55.)

The argument that defendant NALC AFL-CIO violated plaintiffs' procedural due process rights as guaranteed by the LMRDA for its failure to respond to the October 26, 1993 (Rotcher and MacDuffee) appeals by plaintiffs was presented in the opposition papers to the motions for summary judgment for both Johnson and Fontana. (Appellee NALC's SER at p. 868-869, 871-872,

911, 914-915.) In its order on the motion for summary judgment as to Fontana, the district court clearly addressed the issue by stating under the heading "Fontana's Procedural Due Process Claims":

> "Fontana's Eighth Cause of Action for denial of procedural due process against Defendant NALC is based on the Committee's November 9, 1993 decision denying his appeal of his removal from office **and its alleged failure to respond to his October 26, 1993 appeal."** (App. 23.)

The issue was not addressed at all in the district court's ruling on the motion for summary judgment filed by the NALC AFL-CIO against Johnson even though it was argued equally in both Johnson's and Fontana's oppositions.

Plaintiffs' counsel, in oral argument before the judge in the district court on the summary judgment motions, argued that the NALC AFL-CIO's failure to respond to plaintiffs' appeals of the branch action in expelling them, constituted a violation of procedural due process. Plaintiffs' counsel also argued that this procedural due process is guaranteed by the LMRDA. (Johnson ER p. 11, Federal District Court Docket Number 54 Under Case Number 94CV3765, Transcript of Motion Hearing Before the Honorable Consuelo B. Marshall dated Tuesday, November 26, 1996 at p. 66, 67, 68, 71.)

It is true that if any one of the actions taken by plaintiffs to raise the issue of violation of procedural due process for failure to respond to their appeals by the

NALC AFL-CIO would have been the only action, it, singularly, may not be sufficient. *Moreno Roofing Co., Inc. v. Nagle,* 99 F.3d 340, 343 (9th Cir. 1996 – Counsel's remarks during oral argument did not sufficiently raise the issue; *International Travel Marketing v. FDIC,* 45 F.3d 1278, 1286 (9th Cir. 1994) – Raising issue for first time in motion to reconsider grant of summary judgment "is not considered adequate preservation of the issue at the summary judgment stage."

Plaintiffs raised the issue of failure to respond by the NALC AFL-CIO as a violation of procedural due process in the complaint, in both oppositions to motions for summary judgment, in oral argument before the district court (trial court), and the district court acknowledged the issue in one of its orders but failed to address it as stated. The issue was sufficiently raised to the lower court. Consequently, the Ninth Circuit Court of Appeals simply erred in not reaching the issue presented.

Plaintiffs did also discuss the ratification issue in keeping with the NALC constitutional provision entitled "Litigation", Article 17, Sec. 2, which requires ratification by national of the unlawful acts of its branches only "after actual knowledge thereof." (App. 89, 90.)

C. This Court Should Decide the Issue of Whether or Not the Failure to Respond by a National Union, When a Response is Required by the Union Constitution, Constitutes a Violation of a Union Member's Right to Procedural Due Process as Guaranteed by the LMRDA.

The LMRDA Section 411 is titled "Bill of rights: constitution and bylaws of labor organizations." It is clear

from the language of the statute that a labor organization, including the national organization, is subject to the LMRDA. Violation of a federal statute is not a breach of a contract since a statute cannot be construed as a "contract". The statute mandates safeguards for each and every union member against improper disciplinary action by union leadership and governance. The statute also requires that a union member exhaust the administrative remedies provided by the union itself. (29 U.S.C. section 411(a)(4).) In the instant case, such remedies were provided by defendant NALC AFL-CIO in its constitution via its Committee on Appeals and its language by using the word "shall" in mandating what the Committee on Appeals' duties were in regard to union members. (App. 88.)

The LMRDA includes union constitutions in section 411(b):

> **"Invalidity of constitution and bylaws"**
>
> "Any provisions of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

The question then arises if a union member is required to exhaust the internal remedies provided and such remedies are provided, as in the NALC constitution, (App. 86; App. 88, 89.) and the national union does not respond, leaving the member expelled from the union, what is the recourse of the member. Can the national union avoid liability by simply not responding so the union member cannot prove, even circumstantially, that the national union violated the member's bill of rights?

Plaintiffs raise the issue of violation of procedural due process claims as well as breach of contract claims for the NALC AFL-CIO's failure to respond to their October 26, 1993 (Rotcher and MacDuffee) appeals. Even though defendants and the court of appeals assert there is a dispute over whether or not there was a response to those appeals, it is clear from the record that there was no response from the NALC AFL-CIO. The NALC was unable to provide evidence of any response to the October 26th appeals (Rotcher and MacDuffee). (App. 69, 70.) Counsel for defendant NALC AFL-CIO, Michael Feinberg, admitted on the record that the NALC AFL-CIO did not respond to the October 26th appeals by clearly stating in oral argument before the district court at the November 20, 1996 hearing:

> "Now, it's on November 10th that the National Union responded to the first appeal. **The National Union did not respond to the second appeal.**" (Johnson ER, p. 11, Federal District Court Docket Number 53 Under Case Number 94CV3765, Transcript of Motion Hearing Before the Honorable Consuelo B. Marshall dated Wednesday, November 20, 1996, p. 32.)

Counsel Feinberg states at the hearing on the appeal by plaintiffs in responding to the question by one of the appellate judge's: "Did the National respond to the appeal?"

Mr. Feinberg: "There are a number of appeals and yes, the National responded to most **but not all of the appeals**. . . . " (App. 69.)

Mr. Feinberg then went on to describe National's version of events, entirely omitting the fact that one of the

appeals from plaintiff Johnson and one of the appeals from plaintiff Fontana not responded to resulted in **expulsion** for both Johnson and Fontana. He leads the court to believe they were all based on suspension as a discipline, failing to mention the expulsions, just as he did in all his papers submitted to both courts and in his oral arguments to the district court and the court of appeals. (App. 74.) He states the following to the court of appeals:

> "Now, at the very same time that they are considering this appeal, a second appeal on identical charges is filed by Fontana with the National Union. **And it is identical charges with identical result, that is, that Mr. Fontana would be suspended from membership in the Branch for a period of one year.**"
>
> "**It is true that there is no response from the National Union in the record.** And it would be preferable, I will admit, that for the record that the National Union had responded. The record is that the National Union believed it was responding to the suspension issue on the identical charge and was upholding the appeal. And a similar situation occurred with regard to Appellant Johnson." (App. 69, 70.)

Defendant NALC AFL-CIO essentially claims, since it responded to the appeal from the Felde charges for which the plaintiffs were suspended, by overturning the branch's disciplinary suspension, because plaintiffs had a right to file charges, it was evidence of its **intent** to overturn the later October 26th appeals it did not respond to. This argument does not exonerate the NALC AFL-CIO from the requirement to respond to the outstanding

appeals because the most important appeal was over **expulsion** from the union, not suspension as National represented. Each of the October 26th appeals (Rotcher and MacDuffee) was based on different written charges and involved plaintiffs **expulsion from the union.** (Fontana ER at p. 133, 135.) The fact of plaintiffs expulsion was raised by plaintiffs with the district court in numerous documents with reference to supporting exhibits, in oral argument and was similarly raised with the court of appeals. (Fontana Brief for Appellant, United States Court of Appeals for the Ninth Circuit at p. 17, 42; Johnson Brief for Appellant, United States Court of Appeals for the Ninth Circuit at p. 9, 14, 26.) Yet, this very important and pivotal undisputed fact was inexplicably not recognized by either court. Because of the expulsion, it is undisputed that plaintiff Johnson lost her employment as Fourth Vice President of the defendant branch and plaintiff Fontana lost his opportunity to run again for office.

Under the LMRDA, section 411 (a)(5), a union member has a right to expect and receive procedural due process from the member's local and national union. However, when a national union can protect itself and benefit from not following its own constitution which provides its union members with oversight for improper discipline by a local branch, the force and intent of the LMRDA is abrogated and ineffectual. The very events Congress intended to prevent do occur and the legally mandated protection to union members is non-existent.

Union members should be able to sue the national directly for violation of the procedural due process which is protected by the LMRDA when the national union fails

to obey its own constitution. In *Woodell v. International Brotherhood of Electrical Workers*, 502 U.S. 93, 98-99 (1991), this Court, in applying the *Labor Management Relations Act* ("LMRA"), 1947, section 301, 29 U.S.C. Section 185, ruled that suits by individual union members could be brought under the LMRA but must be either for violation of contract between the employer and the labor organization or for violation of a contract between labor organizations. The basis for the reasoning was union members are often the beneficiaries of such inter-union contracts and when they are, they likewise may bring suit on those contracts. *Id.* at 101.

The reasoning would be the same here. Since the LMRDA directly provides union members with a statutory bill of rights with provisions requiring procedural due process for union members. Union members who consider their due process rights violated by their national's failure to review those violations should be able to directly sue the national union for the damages resulting. The member would proceed under a procedural due process claim based on the protections provided by the LMRDA for the failure of the national union to respond to union members' appeals.

CONCLUSION

For the foregoing reasons, certiorari should be granted. Or, in the alternative, this matter should be remanded back to the Ninth Circuit Court of Appeals for a ruling on the issue of violation of procedural due process by the national union for failure to respond to plaintiffs' appeals as required by its constitution.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. JEAN JOHNSON, Plaintiff-Appellant, v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100, and ALL INDIVIDUALS; NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO, Defendants-Appellees.	No. 97-55844 DC No. CV 94-3765 CBM MEMORANDUM*
BASILIO FONTANA, Plaintiff-Appellant, v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100; NATIONAL ASSOCIATION OF LETTER CARRIERS	No. 97-55911 DC No. CV 94-3024 CBM (Filed Jul. 2, 1999)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

AFL-CIO; ARTHUR)
TURNER, Executive Vice)
President of Branch)
1100; WILLIAM)
HEINTZ, Section Vice)
President Branch 1100;)
JOHN WELLEN, First)
Vice President;)
HOWARD KASHINSKY,)
Second)
Vice President; JOHN)
JACKSON, Third Vice)
President; CHARLES)
MILLER, Fifth Vice)
President; THOMAS)
COLADONATO, Sixth)
Vice President; KIRK)
BAIZ, Seventh Vice)
President; RICHARD)
MISNER, Eighth Vice)
President; NORBERTA)
FULLEN, Secretary-)
Treasurer/HBR; BONNIE)
LIPPINCOTT, Chairman)
of the Board of Trustees;)
RICHARD FELDE,)
Trustee; BRUCE)
MacDUFFEE, Union)
Member; MICHAEL)
ROTCHER, Union)
Member; BARBARA)
STICKLER, Union)
Member,)
)
Defendants-Appellees.)
)
)

Appeal from the United States District Court
for the Central District of California
Counsuelo B. Marshall, District Judge, Presiding

Argued and Submitted December 11, 1998
Pasadena, California

Before: BEEZER, HALL, and TASHIMA, Circuit Judges.

The background of these cases is set forth in our published opinion, filed concurrently with this disposition. In this Memorandum, we address those issues raised in these appeals which are not addressed in our opinion.

I. Due Process Claims

The LMRDA provides that "[n]o member of any labor organization may be . . . disciplined . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 29 U.S.C. § 411(a)(5) (1999).

A. Failure to Serve the Felde Charges

Fontana and Johnson argue that the district court did not rule on their claim that the Branch violated their due process rights under the LMRDA by failing to serve them with the Felde charge. The district court, however, did address this issue with respect to Fontana, and found that Fontana had failed to offer any evidence in support of his

assertion that he was not served.[1] On appeal, Fontana and Johnson again fail to cite any support in the record. Rule 28 of the Federal Rules of Appellate Procedure requires an appellant's brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R.App. P. 28(a)(9)(A); *see also* Ninth Cir. R. 28-2.8. In the absence of any reference to the record, we find this claim waived. *Cf. N/S Corp. v. Liberty Mut, Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997) (finding a brief that "leaves it up to the court to attempt to find the asserted information" to violate Rule 28).

B. Adequate Time to Prepare

Fontana and Johnson claim that they were given inadequate time to prepare their defenses because they were never served with the Felde charge and the charges lacked the specificity required by the LMRDA. We reject this argument. The fact that no amount of time would suffice to prepare a defense to an unserved or unspecific charge does not create an additional claim distinct from the underlying claims.

C. The Investigative Committee

Fontana and Johnson contend that the committees charged with investigating them were biased against them. This court has recognized that an unbiased finder

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[1] With respect to Johnson, the district court merely noted that undisputed evidence demonstrated that she had received her full due process rights.

of fact is an integral component of a full and fair hearing. *See Myers v. Affiliated Property Craftsmen Local No. 44, IATSE*, 667 F.2d 817, 820 (9th Cir. 1982). It is also true, however, that "triers of fact can be expected to have some knowledge of the events in question obtained outside of the disciplinary hearing" due to their status as members of the local union. *Id.* Because Fontana and Johnson did not put forth evidence to put into dispute the Branch's evidence that the committees were made up of disinterested union members, we find that there is no genuine issue of material fact that would justify reversing the district court's grant of summary judgment on this claim.

We also reject Fontana and Johnson's contention that the investigative committees violated the NALC Constitution by refusing to allow them to testify before the committees in each other's presence. Fontana and Johnson rely on a September 2, 1993, ruling by the NALC president in an unrelated case that states:

> Article 10 of the [NALC Constitution] does not specifically permit or prohibit a member from representing an officer against whom removal charges have been filed before the committee appointed to investigate the charges. . . . However, a request by a charged party to be represented by a brother/sister NALC member is reasonable on its face. The investigating committee should not deny such a request arbitrarily or capriciously.

The chairperson of one of the committees attested that the decision to question witnesses in the presence only of the charged party was based on a desire to make the witnesses more comfortable, to avoid confrontations

between officers, and to elicit more truthful testimony. We find this explanation to be reasonable, and Fontana and Johnson do not furnish any grounds for us to conclude otherwise. Therefore, we defer to the Branch's implementation of the NALC president's ruling. *See Local 1052, United Bhd. of Carpenters v. Los Angeles County Dist. Council of Carpenters*, 944 F.2d 610, 615 (9th Cir. 1991).

D. Right to Attend the Branch Meeting to Present a Defense

Fontana and Johnson allege that they were not allowed to attend the October 7, 1993, Branch meeting at which the Rotcher and MacDuffee charges were put to a vote because their membership had been suspended at the September 14, 1993, Branch meeting, and therefore they were not allowed to present a defense to the Rotcher and MacDuffee charges. Fontana and Johnson argue that they could not attend the October 7 meeting because a February 2, 1994, ruling by the NALC president in an unrelated case states that suspended members may not attend branch meetings. The Branch, however, submitted evidence that it had invited Fontana and Johnson to attend the meeting. We find that Fontana and Johnson have failed to raise a genuine issue of material fact with respect to this issue. It would be unreasonable for a jury to find that Fontana and Johnson did not attend a meeting to which they had received an express invitation because they were following a presidential ruling that had not yet been issued, particularly in light of the evidence submitted by the Branch that the Branch's policy was to allow visitors to attend the monthly membership

meetings so long as they did not vote. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, we find that summary judgment was appropriate as to this issue.[2]

E. Failure to Respond to Fontana and Johnson's Appeals

Fontana and Johnson argue that the NALC breached the LMRDA and the NALC Constitution by failing to respond to their appeals of their convictions on the Rotcher and MacDuffee charges. We do not reach this claim because Fontana and Johnson raise it for the first time on appeal. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1205-06 (9th Cir.), *cert. denied*, 119 S.Ct. 444 (1998). In their complaints, Fontana and Johnson only allege that the NALC was liable because it ratified the Branch's actions. Fontana and Johnson's papers in opposition to the NALC's motion for summary judgment likewise include no such claims.

F. Ratification

Fontana and Johnson seek to impose liability on the NALC because they allege that the NALC had the requisite knowledge and intent to ratify the violations

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[2] Fontana also contends that his due process rights were violated because he was ejected from the September 14 meeting. We reject this argument because the minutes of the meeting reveal that Fontana was allowed to return to the meeting almost immediately after being ejected, but instead chose to leave on his own accord. Fontana has failed to submit evidence putting the minutes' account of the incident in dispute.

committed by the Branch. A national labor organization is subject to liability for ratification "only if it affirmed the Local's actions 'with full knowledge that it was part of an overall scheme' " to take actions in violation of the LMRDA. *Moore v. Local Union 569 IBEW*, 989 F.2d 1534, 1543 (9th Cir. 1993) (quoting *Rodonich v. House Wreckers Union Local 95, Laborers' Int'l Union*, 817 F.2d 967, 973 (2d Cir. 1987)). We find that Fontana and Johnson have not submitted evidence sufficient to withstand summary judgment on this issue. In fact, the NALC reversed the Branch's suspension of Fontana and Johnson's membership on the Felde charge.

II. Free Speech Claims

29 U.S.C. § 411(a)(2) provides members of labor organizations with certain free speech rights. Fontana and Johnson contend that many of the foregoing arguments as to why the Branch and the NALC violated their due process rights also establish that the Branch and the NALC violated their free speech rights. We reject these arguments for the reasons stated above.

In sum, we affirm the district court's grant of summary judgment to the Branch and the NALC with respect to all issues discussed in this disposition. Costs are allocated as provided in the accompanying opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BASILIO FONTANA, Plaintiff, v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100, et al., Defendants.	CV 94-3024 CBM (Ex) ORDER RE: DEFENDANTS NALC'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF FONTANA (Filed May 13, 1997)

This matter is before the Court on Defendant National Association of Letter Carriers, AFL-CIO's ("NALC") Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues against Plaintiff Basilio Fontana. The parties came before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding over these matters. The Court has considered the motion papers, parties' arguments, and the evidence, and based thereon, issues the following order.

FINDINGS OF FACTS

1. NALC is a national union that represents over 300,000 letter carriers employed by the U.S. Postal Service throughout the country. The duties of the National officers and agents are set forth in the Constitution of the NALC. NALC has numerous affiliated local union, [sic] called "Branches," such as Defendant Branch 1100. The Branches are subject to NALC's overall authority in areas

such as collective bargaining and the handling of grievances arising under those agreements. However, Branches are self-governing organizations, which elect their own officers, hold property, and hire, fire and supervise their own employees.

2. The relationship between NALC and its Branches is governed both by the NALC Constitution, NALC's Constitution for the Government of Subordinate and Federal Branches ("CGSFB"), and by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401 *et seq.*

3. Article 10 of the CGSFB provides detailed procedures for the handling and processing of internal union charges at the Branch level. It provides, in part, that any member of the Branch who violates the Constitution or By-laws of the NALC or Branch may have charges filed against him/her, and if such charges are provided, the member can be fined, reprimanded, suspended or expelled as deemed appropriate. It also provides that any officer of the Branch who fails or neglects to discharge the duties of his/her office, or who may be guilty of gross misconduct may be removed from office. Appeals from Branch level disciplinary actions are set forth at Article 11.

4. NALC Branches have the right to adopt its own by-laws and to elect its own officers and conduct its own affairs consistent with the conditions provided for in the NALC Constitution and LMRDA. The Branches' day-to-day activities and internal affairs are not reported to NALC.

5. Defendant Branch 1100 represents letter carriers throughout Orange County, California. At the time of the alleged events, Branch 1100 had over 5900 members, elected its own officers, maintained its own bank account and owned its own building.

6. Co-Plaintiffs Basilio Fontana ("Fontana") and Jean Johnson ("Johnson") are former officers of the National Association of Letter Carriers, Branch 1100 (the "Branch 1100"). Fontana is a former President of Branch 1100 and Johnson is a former Fourth Vice-President of Branch 1100.

7. In October 1992, the National Association of Letter Carriers, AFL-CIO (the "NALC") held a seminar in Las Vegas to educate its officers from across the nation regarding health benefits available to union members (the "Seminar"). Fontana and Johnson attended the Seminar together. Bonnie Lippincott, Secretary-Treasurer of Branch 1100 ("Lippincott"), who also attended the Seminar, reported to the other Branch officers that Fontana and Johnson failed to attend the seminar classes and charged their personal expenses to union credit cards.

8. Upon their return from the Seminar, Fontana was confronted by the Branch Defendants for misappropriation of union funds at the Seminar.[1] The aforementioned event sparked a sharply polarized political infighting among the Branch officers, with Fontana and Johnson on one side, and all of the other officers on the other.

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[1] Hereinafter, reference to "Branch Defendants" includes Branch 1100 and all the Individual Defendants.

9. On December 13, 1992, the Branch held an Executive Council meeting to discuss the controversy at Branch 1100. Various members of the Branch spoke at the meeting and criticized Fontana's conduct and his leadership of the union.

10. At this meeting, Brian Farris, NALC officer, based in Washington, D.C., was present. However Farris believed that the brewing controversy was strictly a Branch matter and did not discuss it with his fellow NALC officers in any official capacity. (Farris Dep., pp. 82, 90-91, attached to Sutton Decl., Ex. "I").

11. At this meeting, Tom Young, a NALC Business Agent, was also present. Young spoke with Branch officers and attempted to help the officers reconcile their differences. However, after the December 13, 1992 meeting, Young was not involved with or kept updated on the escalating controversy at Branch 1100.

Charges and Appeals.

12. The political infighting at Branch 1100 continued and on February 9, 1993, Fontana was served with six internal union charges filed by other Branch 1100 officers against him alleging various misconduct, including charges of failures to carry out his duties as the President. Pursuant to Article 10, §1 of the NALC Constitution, the charges are read and a committee is formed to investigate the charges. Thereafter, the committee report and the charges are read to the membership and voted upon at the monthly membership meeting. The charged member has at least a month to prepare his defense and appear

before the committee. A committee was formed to investigate the charges against Fontana and he was invited to appear before the committee and defend against the charges, however, Fontana did not appear. At the membership meeting on March 9, 1993, Branch 1100 membership voted on the February 9, 1993 charges against Fontana and he was found guilty as charged.

13. On May 11, 1993, the general membership of Branch 1100 voted on the remaining charges of misconduct against Fontana and voted to remove him from office as the President immediately. On May 28, 1993, Fontana filed an appeal with the NALC's Office of Appeals from his removal from office. Statements and arguments on behalf of both Fontana and Branch 1100 were submitted for NALC's review.

14. No hearing was held by the NALC's Committee on Appeals (the "Committee") concerning Fontana's appeal. On November 9, 1993, the Committee issued its written decision upholding the Branch 1100 membership's vote to remove Fontana as its President.

15. The Committee did not conduct a *de novo* review of the matter, but rather reviewed it to determine whether the Branch's decision violated the NALC's Constitution or the Branch's By-laws. The Committee's decision provided in pertinent part:

> "Based on an examination of the evidence in the record, the Committee on Appeals finds that [Fontana's] appeal is without merit. The Committee finds that the Branch, through its investigation committee, sufficiently carried out all its duties under Article 10 of the CGSFB. . . . Branch's final decision on this issue, was not

> contrary to the obligations prescribed in the NALC National Constitution or the CGSFB. Accordingly, it is the decision of the Committee on Appeals that the appeal by Brother Fontana be, and hereby is, denied.

16. Meanwhile, on August 9 and 10, 1993, Branch 1100 members Bruce MacDuffee and Michael Rotcher filed additional charges against Fontana, seeking expulsion or suspension of his membership in Branch 1100. On September 14, 1993, the Branch membership held a meeting regarding these charges and on October 7, 1993, the Branch membership voted to suspend Fontana's membership through May 30, 1995. Fontana filed appeals of these Branch 1100's actions with the NALC's Committee on Appeals.

17. No hearing was held by the NALC's Committee on Appeals. On November 10, 1993, the Committee issued its written decision upholding Fontana's appeals and overturning Branch 1100's suspension of his membership.

18. Upon his removal from office on May 11, 1993, Fontana stopped paying his union dues and he did not pay his dues during the pendency of his appeal, as required under Article 10(5) of the CGSFB. Even after NALC overturned the Branch's suspension of his membership, Fontana did not bring his union dues obligation current and consequently, suspension of his membership remained in effect.

19. On May 10, 1994, Fontana filed the instant action under the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 through §415, §530; Fair Labor

Standards Act of 1938, 29 U.S.C. §201 et seq.; and the First Amendment of the United States Constitution. Fontana's Complaint alleges Eight (8) Causes of Action.

DISCUSSION

I. Summary Judgment Standard

Summary Judgment is appropriate where no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears the burden of informing the Court of the basis for its motion and identifying parts of the file which it believes indicate an absence of a general issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth affirmative evidence. To withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988), (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

The non-moving party does not satisfy his burden by merely relying upon his own allegations and pleadings. *Hansen v. Black*, 885 F.2d 642, 644 (9th Cir. 1989). Rather, he or she must "produce at least some 'significant probative evidence tending to support the complaint'." *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990) (citations omitted). If the non-moving party bears the

burden of proof with respect to an element essential to the case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural*, 818 F.2d at 1468 (citing *Celotex*, 477 U.S. 317).

II. Fontana's Breach Employment Contract Claims.

Fontana's First Cause of Action is for breach of contract and his Second Cause of Action is for breach of the covenant of good faith and fair dealing. In his Complaint, Fontana alleges that NALC is his "employer" and that it breached its employment contract by either causing or ratifying the Branch Defendants' decision to remove him from office as the President of Branch 1100. However, at his deposition, Fontana admitted that after he was appointed to Branch 1100's Executive Board in 1979, he became a full-time employee of Branch 1100. Moreover, generally, as a matter of law, a national union such as NALC is not considered the "employer" of the employees of its local affiliates, nor will the acts of the local affiliates be imputed automatically to the national union. *United Steelworkers v. Lorain*, 616 F.2d 919 (6th Cir. 1980), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981); *UMWA v. Coronada* [sic] *Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed.2d 975 (1922).

The relationship between NALC and Branch 1100 is governed by the NALC's Constitution and the Branch 1100's By-laws. Article 17, Section 2 of the NALC's Constitution expressly provides: "Neither the National Association nor any of its officers shall be responsible or liable

for the wrongful or unlawful acts of any Branch . . . except where the National Association or its officers have actually participated in [sic] actually authorized such acts, or have ratified such acts after actual knowledge thereof." In this case, there is no evidence establishing that NALC either authorized or participated in the underlying infighting among the Branch 1100 officers and members which cause the filing of charges against Fontana and his removal from office.

Fontana also argues that even if NALC was not his employer, it is nevertheless vicariously liable for the Branch's actions of removing him from office because of an agency relationship created by their national-local relationship. Although common law agency principles are applicable in the area of labor relations, it is well settled that the right to control the alleged agent is fundamental to the existence of the agency relationship. Section 2(13) of the National Labor Relations Act, 29 U.S.C. §152(13), places the burden of showing that a local was acting as an "agent" of a national, upon the party claiming that there is an agency relationship between a national union and its local. *See NLRB v. United Bros. of Carpenter,* 531 F.2d 424, 426 (9th Cir. 1976); *Aguirre v. Automotive Teamsters,* 633 F.2d 168, 172-173 (9th Cir. 1980).

Generally, an agency relationship is created by express authorization. However, authority to act as an agent could be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority. *Id.* A finding of "agency" requires proof that the purported agent was, in fact, acting for and on behalf of its principal and subject to its control. *Id.; see also Coronado Coal Co. v. United Mine Workers,* 279 U.S. 295,

300-01, 45 S.Ct. 551, 552-53, 69 L.Ed. 963 (1925); *Childs v. Local 18, IBEW*, 719 F.2d 1379 (9th Cir. 1983).

In this case, Fontana fails to establish the existence of an agency relationship between NALC and Branch 1100. Undisputed evidence establishes that, at the relevant time, NALC merely exercised supervisory authority over the Branch and did not control the daily business decision of the Branch, including electing, hiring and firing of the Branch's officers and personnel.

Fontana alternatively argues that NALC is liable for the breach of contract claims under a theory of ratification. He contends that when NALC upheld the Branch's removal of him from office by denying his May 28, 1993 appeal, NALC ratified the alleged underlying Branch Defendants's actions which caused the membership to vote him out of the office.

In order to support the allegation that a national union ratified the acts of its local affiliate, there must be some evidence that the national had actual knowledge of the material facts involved in the circumstances or transactions, and evidences an intent to ratify. Ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify. *Rodonich v. House Wreckers Union Local 95*, 817 F.2d 967, 974 (2d Cir. 1987).

In this case, there is no evidence that prior to the appeal, NALC was aware of the alleged underlying actions of the Branch Defendants and that NALC evidenced its intent to ratify these actions. Fontana admitted at his deposition that the only way NALC was informed of the political infighting at Branch 1100 was through the

union's appeals process. The fact that NALC acquired knowledge of Branch 1100 activities through the appeals process, is not sufficient to support a finding of ratification. *See Coronado Coal Co. v. United Mine Workers,* 279 U.S. 295, 300-01, 45 S.Ct. 551, 552-53, 69 L.Ed. 963 (1925); *Brenner v. Local 514, United Bhd. of Carpenters,* 927 F.2d 1283, 1289 (3d. Cir. 1991). NALC's Committee on Appeals did not conduct a *de novo* review of the matters concerning Branch 1100's removal of Fontana from office as the President. The Committee only reviewed and determined whether the Branch's decision violated the NALC's Constitution or the Branch's By-laws. The Committee's finding that the Branch did not violate the governing documents or the procedural provision of the NALC, does not automatically mean that NALC ratified the alleged underlying actions of the Branch Defendants.

Since NALC was never Fontana's employer, and there was no agency relationship or ratification, Fontana cannot sustain his breach of employment contract claims against NALC. Therefore, Defendants motion for summary judgment is granted on Fontana's First and Second Causes of Action.

Fontana's Third Cause of Action is for payment of "earned leave" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§203(d), (e), & (g), 207 and California Labor Code, §227.3. Both FLSA and Cal.Lab.Code §227.3 place obligations to pay compensation upon the employer. Since NALC was never Fontana's employer, NALC has no obligation to make any payments for "earned leave" under neither FLSA or Cal.Lab.Code §227.3; *Suastez v. Plastic Dress-Up Co.,* 3 Cal.3d 774, 183

Cal.Rptr. 846 (1982). Defendant's motion for summary judgment is granted on Fontana's Third Causes of Action.

III. Fontana's Claims for Defamation/Slander/Libel.

Fontana's Fourth and Fifth Causes of Action for Defamation/Slander and Defamation/Libel against all defendants are based on speech and publications made by Branch 1100 members, officers, agents, or employees during political infighting.[2] Fontana claims that the alleged false statements caused the demise of his authority at the Branch and the loss of the memberships' support of him.

However, undisputed evidence shows that none of the alleged speech or publications were made by NALC or its agents or employees. In fact, Fontana testified, at his deposition, that NALC was never involved in the alleged acts of Branch 1100's members and that he only informed NALC of the controversy at Branch 1100 through the internal union appeals process. Fontana's claims against NALC are based on a theory of ratification. Fontana argues that by upholding Branch 1100 memberships' vote to remove him from office, NALC ratified the

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[2] Fontana alleges, *inter alia*, the following incidents as the basis for his defamation claims: 1) Individual defendants of Branch 1100 told the other members of the Branch that Fontana has been "dipping in the till", misappropriating union funds", "stealing money", and "partying on Branch funds"; 2) one of the individual defendants, Defendant Miller, referred to Fontana as a "cheat, liar and a thief" in a telephone conversation with unidentified caller; 3) Fontana was accused at a union meeting by another officer that "all [Fontana] did was sit around staring out the window contemplating while picking his navel."

alleged underlying speech and publication which allegedly caused the membership to vote him out of the office. However, a national union is not responsible *per se* for the acts of its members or one of its locals. *See Coronado Coal, supra; Lorain, supra.*

In this case, there is no evidence establishing that NALC had actual knowledge of the alleged underlying speech and publications. As discussed in respect to Fontana's First and second Causes of Action, the fact that NALC had some knowledge of the Branch's political infighting through the internal union appeals process, is not sufficient to support a finding of ratification of the alleged defamatory statement made by Branch Defendants. Based on the foregoing, Defendant's Motion for summary judgment is granted on Fontana's Fourth and Fifth Causes of Action.

IV. Fontana's Public Policy and "Free Speech" Rights Claims

Fontana's Sixth Cause of Action alleges that Branch 1100 violated fundamental public policy and deprived Fontana his rights to free speech under the First Amendment and the Fourteenth Amendment to the United States Constitution; Article 1, Section 2 of the California State Constitution; NALC's Constitution, Article X; and LMRDA §101(a)(2), 29 U.S.C. §411(a)(2).

First, to the extent that Fontana's claims allege a violation of his state and federal constitutional rights to free speech, Fontana fails to show the requisite element of "state action" as required. *See Rendell-Baker v. Kohn,* 457 U.S. 830, 837-838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982);

Feminist Women's Health Center v. Blythe, 17 Cal.App.4th 1543, 22 Cal.Rptr. 2d 184 (1993).

Second, Fontana's claim for violation of "free speech" rights under the NALC's Constitution is based on the alleged ratification of Branch Defendants' violation of NALC Constitution, Article X, which provides a procedure, pursuant to which union members may file charges against other members for violation of the NALC's Constitution or the Branch's By-laws. In this case, undisputed evidence shows that when Fontana appealed to the NALC's Committee on Appeals from Branch 1100's suspension of his membership for filing internal union charges and appeals, the Committee overturned the Branch's suspension of his membership and upheld his appeal. Therefore, no ratification of any alleged "free speech" violations can be imputed to NALC. Defendant's motion for summary judgment is granted on this claim.

V. Fontana's Conspiracy Claim.

There is no federal statute conferring independent jurisdiction upon the federal courts for claims of civil conspiracy in the labor relations field. *See Building Material and Dump Truck Driver, Local 420 v. Traveek*, 867 F.2d 500, 512 (9th Cir. 1989); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.3d 1362, 1368 (9th Cir. 1981); *Hall v. Pacific Maritime Ass'n*, 281 F.Supp. 54, 61 (N.D. Cal. 1968). "Conspiracy to violate either a labor contract or an individual's rights under the LMRDA does not vest the courts with jurisdiction under §301 of the LMRA or §102 of the LMRDA." *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1254 (2nd Cir.

1970). Therefore, summary judgment is entered in Defendant NALC's favor on Fontana's Seventh Cause of Action.

VI. Fontana's Procedural Due Process Claims.

Fontana's Eighth Cause of Action for denial of procedural due process against Defendant NALC is based on the Committee's November 9, 1993 decision denying his appeal of his removal from office and its alleged failure to respond to his October 26, 1993 appeal. Fontana argues that NALC's Committee on Appeals decisions denying his appeals constituted ratification of the Branch's violation of his "due process" rights under LMRDA, 29 U.S.C. §411(a)(5).

Undisputed evidence establishes that Fontana's appeal to the Committee from the Branch's penalty of suspening [sic] his membership, as a result of the internal union charges was upheld and the suspension of his membership was overturned by NALC on November 10, 1993. Thus, even if NALC failed to respond to Fontana's October 26, 1993 appeal *per se,* this did not constitute ratification of the underlying actions of the Branch Defendants.

With regard to NALC's denial of Fontana's appeal from his removal from office, as discuss [sic] in reference to Fontana's First and second Causes of Action, the mere fact that NALC's Committee on Appeals denied Fontana's May 28, 1993 appeal did not constitute ratification of the alleged underlying Branch Defendants' actions. Ratification can only occur when the principal, having

knowledge of the material facts involved, demonstrates an intent to ratify. *Rodonich, supra,* 817 F.2d at 973; *Moore v. Local Union 569 I.B.E.W.*, 989 F.2d 1534, 1542-43 (9th Cir. 1993). It is undisputed that NALC's Committee on Appeals held no hearings and that the Committee based its decisions on the statements filed by Fontana and the Branch Defendants in the appeals process. Fontana fails to offer "clear and convincing" evidence which establishes that NALC had actual knowledge of what was involved in Branch 1100's political infighting. The fact that a National union acquired knowledge of possible illegal activity by the local is not sufficient to impose a legal duty to intervene by the national union. *Brenner v. Local 514, United Bhd. Of Carpenters,* 927 F.2d 1283, 1289 (3d Cir. 1991). Therefore, Defendant's motion for summary judgment is granted on Fontana's Eighth Cause of Action.

In *Reynolds v. County of San Diego,* 84 F.3d 1162 (9th Cir. 1996), the court held that when federal law claims are eliminated before trial, it would be an abuse of discretion to exercise jurisdiction over pendant state law claims. Therefore, in light of the fact that summary judgment has been granted in favor of Defendant NALC on all of Fontana's federal law claims, any remaining state law claims in this action are dismissed without prejudice. Thus, Fontana is free to pursue any substantive state law claims, either based on state statute or public policy of the state, in state court. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1993); *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990).

Even if the Court had jurisdiction as to any remaining pendant state law claims, the Court declines to

exercise its supplemental jurisdiction over these claims. *O'Conner v. Nevada*, 27 F.3d 357 (9th Cir. 1994); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992); 28 U.S.C. §1367(c).

BASED ON THE FOREGOING, the Court GRANTS Defendant NALC's motion for summary judgment on all federal claims in Plaintiff Fontana's Complaint as against Defendant NALC.

IT IS SO ORDERED.

Date: 5/7/97

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. JEAN JOHNSON, Plaintiff v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100, et al., Defendants.	CV 94-3765 CBM (Ex) ORDER RE: DEFENDANT NALC'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF JOHNSON

(Filed May 2, 1997)

This matter is before the Court on Defendant National Association of Letter Carriers, AFL-CIO's ("NALC") Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues against Plaintiff E. Jean Johnson. The parties came before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding over these matters. The Court has considered the motion papers, parties' arguments, and the evidence, and based thereon, issues the following order.

FINDINGS OF FACTS

1. NALC is a national union that represents over 300,000 letter carriers employed by the U.S. Postal Service throughout the country. The duties of the National officers and agents are set forth in the Constitution of the NALC. NALC has numerous affiliated local union [sic],

called "Branches," such as Defendant Branch 1100. The Branches are subject to NALC's overall authority in areas such as collective bargaining and the handling of grievances arising under those agreements. However, Branches are self-governing organizations, which elect their own officers, hold property, and hire, fire and supervise their own employees.

2. The relationship between NALC and its Branches is governed both by the NALC Constitution, NALC's Constitution for the Government of Subordinate and Federal Branches ("CGSFB"), and by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401 *et seq.*

3. Article 10 of the CGSFB provides detailed procedures for the handling and processing of internal union charges at the Branch level. It provides, in part, that any member of the Branch who violates the Constitution or By-laws of the NALC or Branch may have charges filed against him/her, and if such charges are proved, the member can be fined, reprimanded, suspended or expelled as deemed appropriate. It also provides that any officer of the Branch who fails or neglects to discharge the duties of his/her office, or who may be guilty of gross misconduct may be removed from office. Appeals from Branch level disciplinary actions are set forth at Article 11.

4. The NALC Branches have the right to adopt its own by-laws and to elect its own officers and conduct its own affairs consistent with the conditions provided for in the NALC Constitution and LMRDA. The Branches' day-to-day activities and internal affairs are not reported to

NALC. Defendant Branch 1100 represents letter carriers throughout Orange County, California. At the time of the alleged events, Branch 1100 had over 5900 members, elected its own officers, maintained its own bank account and owned its own building.

5. Co-Plaintiffs Bacilli Fontana ("Fontana") and Jean Johnson ("Johnson") are former officers of the National Association of Letter Carriers, Branch 1100 (the "Branch 1100"). Fontana is a former President of Branch 1100 and Johnson is a former Fourth Vice-President of Branch 1100.

6. In October 1992, the National Association of Letter Carriers, AFL-CIO (the "NALC") held a seminar in Las Vegas to educate its officers from across the nation regarding health benefits available to union members (the "Seminar"). Fontina and Johnson attended the Seminar together. Bonnie Lippincott, Secretary-Treasurer of Branch 1100 ("Lippincott"), who also attended the Seminar, reported to the other Branch officers that Fontana and Johnson failed to attend the seminar classes and charged their personal expenses to union credit cards.

7. Upon their return from the Seminar, Fontana was confronted by Branch 1100 membership regarding misappropriation of union funds at the Seminar. The aforementioned event sparked a sharply polarized political infighting among the Branch officers, with Fontana and Johnson on one side, and all of other officers on the other.

8. On December 13, 1992, the Branch held an Executive Council meeting to discuss the controversy at Branch 1100. Various members of the Branch spoke at the meeting and criticized Fontana's conduct and his leadership of the union.

9. At this meeting, Brian Farris, NALC officer, based in Washington, D.C., was present. However Farris believed that the brewing controversy was strictly a Branch matter and did not discuss it with his fellow NALC officers in any official capacity.

10. At this meeting, Tom Young, a NALC Business Agent, was also present. Young spoke with Branch officers and attempted to help the officers reconcile their differences. However, after the December 13, 1992 meeting, Young was not involved with or kept updated on the escalating controversy at Branch 1100.

Charges and Appeals.

11. The political infighting at Branch 1100 continued and in early 1993, Fontina began filing numerous charges of insubordination and violation of Branch 1100 By-laws against the other officers, and they, in turn, filed counter-charges against Fontina and Johnson alleging various misconduct. Eventually, the NALC's Appeals Committee dismissed all of the charges against the other officers, but ratified Branch 1100's membership's vote on May 11, 1993, to remove Fontana as its President. After Fontana's removal, executive vice-president Arthur Turner ("Turner") became President of Branch 1100.

12. During the political infighting at Branch 1100, Johnson claims that because of her support of Fontina, she was subjected to violent verbal abuses and physical intimidations at the hands of the other Branch officers, who are the individual defendants in this action.

13. In her Complaint, Johnson alleges that other officers of Branch 1100, who are named as individual defendants in this action, told union Executive Board members, Branch membership, and unidentified non-union members that Johnson had misappropriated Branch funds, had been "dipping in the till" and "partying on Branch funds". Johnson also alleges that Defendant Miller referred to Johnson as a "cheat, whore, liar and a thief" by telephone to a person whose name is not known to Johnson. Complaint ¶54.

14. In addition, in support of her claims against Branch 1100 and the Individual Defendants, Johnson alleges that they did the following: a) breaking into her locked office, going through her personal effects; b) disseminating confidential medical information in a letter from her psychiatrist without her authorization; c) slashing the Christmas wrapping paper Johnson had used to decorate the framed awards behind her desk in her office; d) trying to cause Johnson to fall down the stairway by physically bumping into her at the top of the stairway; f) throwing a briefcase against the wall to frighten her after Johnson had called the police on a fellow Branch 1100 officer; g) putting a bullet on her desk to intimidate her; h) putting her name and telephone number in the men's bathroom at a bar that is frequented by union officers; I) yelling at her "you're fucking dead, you're fucking dead, you are dead!" after she filed charges against the other Branch 1100 officers.

15. Sometime in May 1993, before Fontana's removal from office, Johnson presented a letter dated April 27, 1993, from her psychiatrist, Dr. Melissa Defler to President Fontana and requested accommodation of her

stress-related disability. Dr. Defler's letter indicated that Johnson was unable to work with the male officers of Branch 1100 because of her mental and emotional stress-related disability.

16. After Turner replaced Fontana as the President of Branch 1100, in response to Johnson's request, Turner instructed that Johnson's work be coordinated through the only other female officer at the Branch, Norberta Fullen. However, Johnson disregarded Turner's instructions, and failed to report her daily whereabouts to Fullen and the Branch, refused to attend staff meetings, and refused to coordinate her work with the other staff members. Therefore, Turner requested further explanation regarding her disability and medical restriction but did not receive a response from Johnson. On May 13, 1993, an Executive Council meeting was held at Branch 1100 to determine whether the Branch would continue to accommodate Johnson's alleged disability. At this meeting, Dr. Derfler's letter was read by Turner to the Council. Consequently, the Council determined that there was no basis to continue to accommodate Johnson's alleged disability.

17. On June 10, 1993, Turner de-certified Johnson for field work. On or about June 12, 1993, Johnson stopped working at the Branch and filed for unemployment benefits and a Workers' Compensation claim. Johnson's Workers' Compensation claim was denied by the insurance carrier but she began receiving unemployment benefits. Therefore, Johnson ceased to receive a regular paycheck from Branch 1100.

18. Branch 1100's officer's union dues are ordinarily deducted from his/her paycheck and sent direct to the

union. Thus, when Johnson stopped drawing a regular paycheck, her union dues were not paid.

19. On August 9, 1993 and August 10, 1993, Johnson's fellow officers of Branch 1100, Bruce MacDuffee, Michael Rotcher and Richard Felde filed charges against Johnson alleging, *inter alia*, that she had violated the NALC Constitution and CGSFB and had breached her trust to Branch membership by aiding and abetting Fontana in the pursuit of his internal union charges against other officers of Branch 1100. According to the September 14, 1993 Branch 1100 Investigating Committee Report, Fontana had filed 34 individual charges against fellow unionists since February 1993.

20. Branch 1100 Investigating Committee investigated the other officers' charges against Johnson. On September 14, 1993, Branch 1100 membership voted to sustain the Felde charge against Johnson and a penalty was imposed. Johnson's membership was suspended through May 30, 1995. At the September 14, 1993, consideration of the investigating committee reports into MacDuffee's and Rotcher's charges was deferred until October 7, 1993. At the October 7, 1993 meeting, Branch 1100's membership voted to sustain the MacDuffee and Rotcher charges against Johnson.

21. On October 4, 1993, Johnson filed an internal union appeal with the NALC Office of Appeals for a review of the September 14, 1993 action of Branch 1100 sustaining Felde charge; and on October 26, 1993, Johnson filed an appeal of Branch 1100's October 7, 1993 action.

22. No hearing was held by the NALC's Committee on Appeals concerning Johnson's appeals. The Committee on Appeals issued its written decision on November 10, 1993 stating in pertinent part:

> Based on an examination of the evidence in the record, the Committee on Appeals finds [Johnson's] appeal should be sustained. Every member has the right under the Constitution to file internal union charges. Thus the Committee on Appeals finds that it is contrary to the purposes of the Constitution [sic] suspend membership on this basis . . . Accordingly, it is the decision of the Committee on Appeals that the appeal by Sister Johnson should be, and hereby is, upheld.

However, even after the Committee on Appeals upheld her appeal, Johnson's suspension from membership remained in effect due to her failure to pay her union dues during the pendency of her appeals. Pursuant to Article 10(5) of the CGSFB, a member is required to fulfill her dues obligation even during periods of suspension.

23. Johnson made no attempt to bring her union dues obligation current and have her membership reinstated. On October 22, 1993, the Branch informed Johnson about her delinquent union dues, and specifically stated that unless her union dues balance was brought current, her membership would be suspended. In November 1993, Branch 1100 sent Johnson another notice of dues owed. On March 25, 1994, Branch 1100 suspended Johnson's membership because she failed to pay her union membership dues.

24. Under Branch 1100's By-laws, one must be a member of the union to hold an officer's position. Therefore, when her membership was suspended, Johnson was no longer qualified for the position of a Fourth Vice-President at Branch 1100.

25. On June 6, 1994, Johnson filed the instant action under Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 through §415, §530; Fair Labor Standards Act of 1938, 29 U.S.C. §201 et seq.; the Americans With Disabilities Act of 1990, 42 U.S.C. §12101 et seq.; and the First Amendment of the United States Constitution. Johnson's Complaint alleges Thirteen (13) Causes of Action.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears the burden of informing the Court of the basis for its motion and identifying parts of the file which it believes indicate an absence of a general issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth affirmative evidence. To withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th

Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988), (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

The non-moving party does not satisfy his burden by merely relying upon his own allegations and pleadings. *Hansen v. Black*, 885 F.2d 642, 644 (9th Cir. 1989). Rather, he or she must "produce at least some 'significant probative evidence tending to support the complaint'." *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990) (citations omitted). If the non-moving party bears the burden of proof with respect to an element essential to the case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural*, 818 F.2d at 1468 (citing *Celotex*, 477 U.S. 317).

II. Johnson's Breach Employment Contract Claims.

Johnson's First Cause of Action is for breach of an employment contract and her Second Cause of Action is for breach of the covenant of good faith and fair dealing. Johnson alleges that NALC is her "employer" and that it breached the employment contract by causing and/or ratifying Branch 1100's decision to remove her from office as the Fourth Vice President of Branch 1100. However, at her deposition, Johnson admitted that Branch 1100 and not NALC was her employer. That being the case, she cannot claim to have had an employment contract with NALC, nor consequently, an implied covenant of good faith and fair dealing arising out of such employment contract.

Moreover, generally, as a matter of law, a national union such as the NALC is not considered the "employer" of the employees of its local affiliates, and therefore, the acts of the local affiliates are not imputed automatically to the national union. *United Steelworkers v. Lorain*, 616 F.2d 919 (6th Cir. 1980), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981); *UMWA v. Coronada Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed.2d 975 (1922).

Despite her admission that NALC is not her employer, in her Opposition to this motion, Johnson argues that NALC is liable for these claims on the basis of ratification. Johnson contends that NALC's denial of her appeals from the Branch Defendants' removal of her from office, constituted ratification of the alleged Branch Defendants' underlying actions which violated her rights under the LMRDA, the NALC Constitution, the Branch 1100 By-laws, and California labor law.

Ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify. *Rudonich v. House Wreckers Union Local 95*, 817 F.2d 967, 974 (2d Cir. 1987). In this case, there is no evidence that prior to the appeal, NALC was aware of the alleged underlying actions of the Branch and that NALC had intent to ratify them. Johnson admitted at her deposition that the only way NALC was informed of the political infighting at Branch 1100 was through the union's appeals process. However, the mere fact that NALC's Committee on Appeals had some knowledge of the controversy at Branch 1100 through Johnson's appeals is insufficient to show NALC's ratification of the alleged underlying actions of the Branch 1100

and all the Individual Defendants. *See Coronado Coal Co. v. United Mine Workers*, 279 U.S. 295, 300-01, 45 S.Ct. 551, 552-53, 69 L.Ed. 963 (1925).

Moreover, contrary to Johnson's contention of ratification, NALC's Committee on Appeals' decision of November 10, 1993 actually overturned the Branch's action with respect to Felde's charges against Johnson and the resulting penalty of suspending her membership. This action of NALC demonstrates that NALC did not ratify the underlying Branch Defendants' actions suspending her membership until May 30, 1995, which would have disqualified her from holding an office at the Branch. Undisputed evidence shows that Johnson became unqualified to served [sic] as an officer at Branch 1100 because she failed to pay her union membership dues during the pendency of her appeals, as required under the Branch's By-laws. Evidence also shows that after NALC upheld her appeal and overturned the Branch's suspension of her membership, Johnson had ample opportunity to bring her membership obligations current and reinstate her membership. However, Johnson made no attempts to pay her union dues and thus became unqualified to hold an office at Branch 1100.

Johnson also argues that NALC is vicariously liable for these claims on the basis of common law agency theory. While the common law agency principles are applicable to national-local labor relationship, it is well settled that the right to control the alleged agent is fundamental to the existence of the agency relationship; and Section 2(13) of the National Labor Relations Act ("NLRA), 29 U.S.C. §152(13), places the burden of proof

upon the party claiming that there is an agency relationship between a national union and its local. *See NLRB v. United Bros. of Carpenter*, 531 F.2d 424, 426 (9th Cir. 1976); *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 172-173 (9th Cir. 1980).

Generally, an agency relationship is created by express authorization. However, authority to act as an agent could be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority. *Id.* A finding of an agency requires proof that the purported agent was, in fact, acting for and on behalf of its principal and subject to its control. *Id.; see also Coronado Coal Co. v. United Mine Workers*, 279 U.S. 295, 300-01, 45 S.Ct. 551, 552-53, 69 L.Ed. 963 (1925); *Childs v. Local 18, IBEW*, 719 F.2d 1379 (9th Cir. 1983).

In this case, the relationship between NALC and Branch 1100 is governed by the NALC's Constitution and the Branch 1100's By-laws; and Article 17, Section 2 of the NALC's Constitution expressly provides: "Neither the National Association nor any of its officers shall be responsible or liable for the wrongful or unlawful acts of any Branch . . . except where the National Association or its officers have actually participated in actually authorized such acts, or have ratified such acts after actual knowledge thereof."

Here, Johnson fails to offer evidence establishing that NALC either participated in or authorized the alleged underlying actions of the Branch, or that NALC ratified such underlying actions of the Branch after actual knowledge thereof. Undisputed evidence establishes that NALC merely exercised supervisory authority over its

Branches and did not control the daily business decision of its Branches, including electing, hiring and firing of the Branches's officers and personnel. Therefore, the Court finds no agency relationship between NALC and the Branch. Defendant's motion for summary judgment is granted on Johnson's First and Second Causes of Action.

Johnsons's Third Cause of Action is for wages earned under the Fair Labor Standards Act ("FLSA"), California Labor Code, §227.3 and Branch 1100's By-laws. Since NALC was never Johnson's employer, NALC had no obligation to pay any of Johnson's alleged overtime payments under the FLSA, 29 U.S.C. §§ 203(d), (e), & (g), 207; or California Labor Code, §277.3; *Suastez v. Plastic Dress-Up Co.*, 3 Cal.3d 774, 183 Cal.Rptr. 846 (1982). Accordingly, Defendant's motion for summary judgment is granted on Johnson's Third Cause of Action.

III. Johnson's Claims for Defamation/Slander/Libel.

Johnson's Fourth and Fifth Causes of Action for Defamation/Slander and Defamation/Libel are based on conduct and communications among Branch 1100 members regarding Johnson's ethics, morals and conduct. Undisputed evidence shows that none of the alleged conduct and communications were made by NALC or its agents or employees; all of the persons involved in the alleged conduct and communications were associated with Branch 1100, its officers, agents, or employees.

Evidence establishing authorization or ratification by NALC of the alleged conduct and communications of the Branch Defendants is necessary to impute liability to

NALC. However, there is no such evidence. Johnson testified at her deposition that NALC was never involved in the infighting at Branch 1100 and that she never directly informed NALC of the scope and nature of the alleged conduct and communications. Johnson also admitted that the only way in which NALC was informed of the alleged conduct and communications of the Branch Defendants, was through her internal union appeals. Based on NALC's Committee on Appeals' review of her appeals, Johnson contends that NALC ratified the alleged conduct and communications. However, the mere fact that NALC's Committee on Appeals reviewed her appeals regarding the Branch's actions, with respect to the charges filed against her by her fellow Branch officers, does not constitute NALC's authorization or ratification of the alleged acts. There is no evidence that any NALC officer, agent or employee published, authorized or ratified any defamatory statements alleged under these claims. Therefore, Defendant's motion for summary judgment is granted on Johnson's Fourth and Fifth Causes of Action.

IV. Johnson's Public Policy and "Free Speech" Rights Claims

Johnson's Sixth Cause of Action alleges that Branch 1100 violated fundamental public policy and deprived Johnson of her rights to free speech under the First Amendment in conjunction with the Fourteenth Amendment to the United States Constitution; Article 1, Section

2 of the California State Constitution; NALC's Constitution, Article X; and LMRDA §101(a)(2), 29 U.S.C. §411(a)(2).

Johnson alleges that Branch Defendants violated her free speech rights by: 1) not permitting Johnson and Fontana to appear together before the investigative committee; 2) filing internal union charges against Johnson in retaliation of her support of and alliance with Fontana; 3) suspending her membership at the September 14, 1993 Branch meeting, and thus precluding her attendance at the October 7, 1993 Branch meeting to defend herself against the charges brought by Defendant MacDuffee and Rotcher; 4) preventing Johnson from addressing the membership regarding the charges against Fontana; 5) decertifying and removing Johnson from field contact with union members. Complaint ¶73.

First, to the extent that Johnson's claims allege a violation of her state and federal constitutional rights to free speech, Johnson fails to show the requisite element of "state action" as required. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837-838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); *Feminist Women's Health Center v. Blythe*, 17 Cal. App.4th 1543, 1561, 22 Cal.Rptr.2d 184, 193 (1993).

Second, Johnson's claim for violation of "free speech" rights under the NALC's Constitution is based on the alleged ratification of Branch Defendants' violation of NALC Constitution, Article X, which provides a procedure pursuant to which union members may file charges against other members for violation of the NALC's Constitution or the local Branch's By-laws.

Regardless of whether NALC ratified the Branch Defendants' conduct, this claim is time-barred.

Claims for breach of a union constitution and by-laws have been characterized by the Supreme Court as claims for breach of Section 301 agreements, and thus, are governed by the six month statute of limitations set forth in Section 10(b) of the NLRA, 29 U.S.C. §160(b). Here, the last act regarding Johnson's appeal by Defendant NALC was taken on November 10, 1993 when NALC's Committee on Appeals upheld Johnson's appeal and overturned Branch Defendants' suspension of her membership. Given that the Complaint in this action was not filed until June 4, 1994, Johnson's claims under NALC Constitution and Branch 1100's By-laws are time-barred. *See Moore, supra,* 989 F.2d at 1541-1542; *see also Lingle v. Norge Div. Of Magic Chef, Inc.,* 486 U.S. 399, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410 (1988); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); 39 U.S.C. 1209; *see also, Wooddell, supra,* 502 U.S. at 102-03; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. Local 334,* 452 U.S. 615, 101 S.Ct. 2546, 69 L.Ed.2d 280 (1981).

Johnson also alleges free speech claims under Section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2). Section 411(a)(2) creates a right of freedom of speech and assembly for members to discuss union topics. *Rodonich, supra,* 817 F.2d 967, 973; *Moore, supra,* 989 F.2d at 1542-1543. In this case, there is no evidence of NALC's ratification of any §411(a)(2) violations. In fact, NALC overturned Branch 1100's action and upheld Johnson's appeal protesting Branch officers' charges filed against her because

of her support of Fontana. Therefore, there is no evidence to support Johnson's claims for free speech infringement against Defendant NALC. Defendant's motion for summary judgment is granted on Johnson's Sixth Cause of Action.

V. Johnson's Conspiracy Claim.

Johnson's Seventh Cause of Action for Conspiracy as to all the defendant [sic], fails to state a claim upon which relief can be granted. There is no federal statute conferring independent jurisdiction upon the federal courts for claims of civil conspiracy in the labor relations field. *See Building Material and Dump Truck Driver, Local 420 v. Traweek*, 867 F.2d 500, 512 (9th Cir. 1989); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.3d 1362, 1368 (9th Cir. 1981); *see also, Hall v. Pacific Maritime Ass'n*, 281 F.Supp. 54, 61 (N.D. Cal. 1968). "Conspiracy to violate either a labor contract or an individual's rights under the LMRDA does not vest the courts with jurisdiction under the §301 of the LMRA or §102 of the LMRDA." *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1253 (2nd Cir. 1970). Moreover, Johnson cites to no authority creating common law federal torts based upon an allegation of conspiracy alone. Therefore, Defendant's motion for summary judgment is granted on Johnson's Seventh Cause of Action.

VI. Johnson's Procedural Due Process Claims.

Johnson's Eighth Cause of Action for denial of procedural due process and violation of public policy is predicated on alleged improper internal union discipline

during the investigatory process, and Johnson's removal from office as Branch 1100's Fourth Vice-President, in violation of LMRDA, 29 U.S.C. §411 (a) (5). Section 411 (a) (5) provides that "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues by such organization or by any officer thereof unless such member has been: 1) served with written specific charges; 2) given a reasonable time to prepare his defense; 3) afforded a full and fair hearing.

During the union disciplinary hearings and investigatory committee proceedings at Branch 1100, Johnson was given many opportunities to present her defense to the Levicki Investigatory Committee. However, Johnson did not take the opportunities offered to her because Branch 1100 investigatory committee would not permit her to have Fontana accompany to the heraing. [sic] Undisputed evidence shows that the investigatory committee's regular policy is to interview only one witness at a time in order to protect witnesses from coercion from other witnesses. While §411 (a) (5) required that Johnson be given an opportunity to present her defense, it does nto [sic] require the Committee to change its regular practice and procedure regarding witnesses just for Johnson. Therefore, there was no violation of procedural due process under §411 (a) (5) during the investigatory committee hearings.

Johnson also alleges that her procedural due process rights were violated when she was denied the opportunity to attend and defend herself against Richard Felde's charges at the October 7, 1993 meeting. The minutes from the Branch meetings show that Johnson

attended the meeting on September 14, 1993, and at this meeting, the Levicki Investigatory Committee, which reviewed the charges filed by Richard Felde, Michael Rotcher, and Bruce MacDuffee against Johnson, read its report to the membership and the union voted to accept a portion of the said report. Evidence also shows that because not all of the charges against Johnson were addressed at the September 14, 1993 meeting, it was announced that the remaining charges would be voted on during the October 7, 1993 membership meeting. Thus, Johnson had actual notice of the October 1993 meeting. Johnson does not deny that she knew about the October 1993 meeting, instead, Johnson claims that because the Branch had suspended her union membership at the September meeing, [sic] she believed that she could not attend the October meeting.

However, undisputed evidence demonstrates that at Branch 1100, non-members regularly attended the Branch's monthly membership meetings. Considering the number of years Johnson had been a member of Branch 1100, and having served as Branch 1100's Fourth Vice-President for several years, Johnson's purported belief that she could not attend the October 1993 meeting merely because her membership was suspended, was unreasonable. Moreover, Johnson had no reason to believe that she would be barred from the October 1993 meeting particularly since she knew that the charges against her would be discussed and voted upon at the meeting.

Assuming, *arguendo*, that the Branch Defendants violated Johnson's procedural due process at the September 14, 1993 or October 7, 1993 Branch meetings, Johnson's

claims for "due process" violations against NALC on the basis of ratification cannot be sustained. Undisputed evidence shows that NALC, in fact, overturned Branch 1100's actions of suspending Johnson's membership and showed its intent not to ratify Branch 1100's acitons. [sic] Therefore, there was no violation of procedural due process during the membership hearings under §411 (a) (5). Defendant's motion for summary judgment is granted on Johnson's Eighth Cause of Action.

VII. Johnson Emotional Distress Claims.

Johnson's Ninth and Tenth Causes of Action allege State law claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress. Since Johnson testified that her employment contract is embodied in the NALC's Constitution and Branch 1100's By-laws, and because her emotional distress claims incorporates and alleges the same violation of the NALC's Constitution and Branch 1100's By-laws as set forth in her First through Eighth Causes of Action, her emotional distress claims would require interpretation and application of NALC Constitution and Branch 1100's By-laws. Therefore, Johnson's emotional distress claims are preempted. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410 (1988); *Allis-Chalmers Corp. V. Lueck*, 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); 39 U.S.C. 1209.

In her Opposition, Johnson argues that her State law claims for emotional distress are not preempted because the alleged conduct of Branch 1100 and the Individual

Defendants falls within the "outrageous conduct" exception of *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), *citing Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). In *Farmer*, the Supreme Court held that where the plaintiff alleges and can prove "outrageous conduct" resulting in actual injury, a claim against a union for emotional distress damages will not be preempted by Section 301.

In this case, undisputed evidence establishes that NALC, its agents, and employees were never involved in the alleged underlying conduct, nor authorized or ratified the alleged conduct of Branch Defendants. Therefore, Johnson [sic] claim as against NALC is preempted and time-barred. Defendant's motion for summary judgment is granted in favor of Defendant NALC on Johnson's Ninth and Tenth Causes of Action.

VIII. Johnson's ADA Claim.

Johnson's Eleventh Cause of Action alleges that in 1993, Branch 1100 failed to accommodate her stress related disability in violation of public policy and the Americans with Disabilities Act ("ADA"). First, having already found that NALC was never Johnson's employer, Johnson cannot state an ADA claim against NALC. ADA requirements applied only to employers who "employ[ed] 25 or more employees." 42 U.S.C. §12111 (4), (5) (A); C.F.R. §1630.2 (b), (f). The Court finds that in 1993, the Branch 1100 was not an "employer" required to adhere to the provisions of the ADA because it did not employ 25 or more ADA "employees."

Johnson also argues that NALC is liable for this claim because NALC and Branch 1100 are a "single-employing unit." The Ninth Circuit addressed the issue of a joint employer theory in *Childs v. Local 18, I.B.E.W.*, 719 F.2d 1379; and stated that in determining whether the national union and a branch are a single employing unit, the court should consider the following: (1) the inter-relations of operations between the two entities; (2) common management; and (3) centralized control of labor relations.

In this case, there is no evidence that NALC exerted control over the functions of the Branch's regular and routine business. Branch 1100 maintains a separate treasury from NALC, conducts its own labor relations with Branch membership, elects, hires and fires its own employees. The fact that Branch 1100 follows the NALC's Constitution and participates in the collection of membership dues is not sufficient to support a finding of a "single employing unit" status under *Childs*.

Accordingly, the Court finds the national-local relationship between NALC and Branch 1100 is insufficient to create a "single employing unit" status. Therefore, Johnson cannot state an ADA claim against NALC. Defendant's motion for summary judgment is granted on Johnson's Eleventh Cause of Action.

IX. Johnson's Invasion of Privacy Claims.

Johnson's Twelfth Cause of Action alleges a claim for Invasion of Privacy based on the reading of a letter dated April 27, 1993, which was written by her psychiatrist, Dr. Melissa Derfler, regarding her stress-related disability.

Johnson contends that fellow officers at the Branch took the letter from her desk at the Branch 1100's office without her authorization, and that Turner, the Branch President, disclosed the content therein regarding her work restrictions and medical condition at the Executive Council meeting on May 13, 1993.

Johnson offers no evidence that NALC, or any agent or employee of NALC was involved in the alleged invasion of her privacy. There is no evidence that any NALC officer, agent or employee was present at the May 13, 1993 meeting. Furthermore, Johnson offers no evidence to establish that NALC was even aware of the alleged activities, or that there was ratification by NALC thereof. Therefore, Defendant's motion for summary judgment is granted on Johnson's Twelfth Cause of Action.

X. Johnson's Retaliation Claim.

Johnson's Thirteenth Cause of Action for "Violation of Public Policy – Retaliation" is predicated on the same facts she alleges in her First through Twelfth Cause of Action. Neither NALC or Johnson address the Thirteenth Cause of Action in their papers. However, in light of the Court's granting of Defendant NALC's motion for summary judgment Johnson's First through Twelfth Cause of Action, there is no genuine issue of material fact in dispute in regard to this claim. Thus, the Court granted Defendant's motion for summary judgment on Johnson's Thirteenth Cause of Action.

In *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996), the court held that when federal law claims are eliminated before trial, it would be an abuse of discretion

to exercise jurisdiction over pendant state law claims. Therefore, in light of the fact that summary judgment has been granted in favor of Defendant NALC on all of Johnson's federal law claims, any remaining state law claims in this action are dismissed without prejudice. Thus, Johnson is free to pursue any substantive state law claims, either based on state statute or public policy of state, in state court. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1993); *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990).

Even if the Court has jurisdiction as to any remaining pendant state law claims in this action, the Court declines to exercise its supplemental jurisdiction over these claims. *O'Connor v. Nevada*, 27 F.3d 357 (9th Cir. 1994); *Imagineering, Inc. V. Keiwit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992); 28 U.S.C. §1367(c).

BASED ON the FOREGOING, the Court GRANTS Defendant NALC's motion for summary judgment on all federal claims in Plaintiff Johnson's Complaint as against Defendant NALC.

IT IS SO ORDERED.

Date: 4/30/97

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. JEAN JOHNSON, *Plaintiff-Appellant,* v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100, and ALL INDIVIDUALS; NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO, *Defendants-Appellees.*	No. 97-55844 D.C. No. CV 94-03765 CBM
BASILIO FONTANA, *Plaintiff-Appellant,* v. NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 1100; NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO; ARTHUR TURNER, Executive Vice President of Branch 1100; WILLIAM HEINTZ, Section Vice President Branch 1100; JOHN WELLEN, First Vice President; HOWARD KASHINSKY, Second Vice President; JOHN JACKSON, Third Vice President; CHARLES MILLER, Fifth Vice President; THOMAS COLADONATO, Sixth Vice President; KIRK BAIZ, Seventh Vice President; RICHARD MISNER, Eighth Vice	No. 97-55911 D.C. No. CV 94-03024 CBM OPINION

President; MORBERTA FULLEN, Secretary-Treasurer/HBR; BONNIE LIPPINCOTT, Chairman of the Board of Trustees; RICHARD FELDE, Trustee; BRUCE MACDUFFEE Union Member; MICHAEL ROTCHER, Union Member, BARBARA STICKLER, Union Member,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
December 11, 1998 – Pasadena, California

Filed July 2, 1999

Before: Robert R. Beezer, Cynthia Holcomb Hall, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Christpher L. Diener, Newport Beach, California, for the plaintiffs-appellants.

Richard J. Mathias, Curiale, Dellaverson, Hirschfeld, Kelly & Kraemer, Los Angeles, California, for defendant-appellee National Association of Letter Carriers Branch 1100 and individual defendants-appellees.

Michael R. Feinberg, Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, for defendant-appellee National Association of Letter Carriers.

OPINION

TASHIMA, Circuit Judge:

Basilio Fontana and E. Jean Johnson appeal the district court's award of summary judgment to the National Association of Letter Carriers, Branch 1100 and certain individual members (collectively the "Branch"), and the National Association of Letter Carriers ("NALC"). Fontana and Johnson, the former president and former fourth vice-president of the Branch, respectively, sued the Branch and the NALC for violations of their free speech and procedural due process rights guaranteed by the NALC Constitution and section 101(a) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand on the issue addressed in this opinion.[1]

I.

The NALC is a national labor union that represents letter carriers employed by the United States Postal Service. The Branch is a local union affiliated with the NALC, representing letter carriers in Orange County, California.

In October 1992, Fontana and Johnson attended a NALC seminar in Las Vegas, Nevada. A Branch officer in

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[1] In this opinion, we discuss only the issue of the degree of specificity with which a charge must be made under the LMRDA. We address all other issues raised on this appeal in a separate, unpublished disposition, filed concurrently with this opinion.

attendance reported to other Branch officers that Fontana and Johnson had failed to attend classes at the seminar and had charged personal expenses on their union credit cards. Branch officers subsequently accused Fontana of misappropriating union funds. Political tensions within the Branch grew, and Fontana filed numerous charges against other officers for insubordination and violations of the Branch's by-laws. In February 1993, Branch officers brought charges of their own against Fontana. By May, the Branch membership had found Fontana guilty and removed him from the office of Branch president. Fontana retained his membership in the Branch.

On August 9 and 10, 1993, three Branch members filed additional charges against Fontana and Johnson. Richard Felde charged Fontana with misconduct based on his disrupting the Branch by repeatedly filing frivolous charges against other members, and Johnson with misconduct based on her aiding Fontana in filing these charges ("Felde charge"); Bruce MacDuffee charged them with breach of trust and perfidy based on their filing of frivolous charges and misuse of their positions of influence ("MacDuffee charge"); and Michael Rotcher charged them with misconduct and perfidy based on their filing frivolous charges, exceeding authority, subverting the will of the membership, and making politically motivated decisions ("Rotcher charge"). Committees were appointed to investigate these charges and present reports of their findings to the Branch membership.

On September 14, 1993, the Branch membership found Fontana and Johnson guilty of the Felde charge and suspended their membership. On October 7, 1993, the Branch membership found Fontana and Johnson

guilty of the MacDuffee and Rotcher charges as well. Fontana and Johnson appealed these decisions to the NALC. On November 10, 1993, the NALC's Committee on Appeals reversed Fontana and Johnson's suspensions with respect to the Felde charge. Their suspensions remained in effect, however, because they had failed to pay union dues while their appeals were pending. There appears to be some dispute as to whether the Committee on Appeals ever responded to Fontana and Johnson's appeals of their suspensions with respect to the MacDuffee and Rotcher charges.

On May 10, 1994, Fontana brought suit in federal court against the Branch, individual members of the Branch, and the NALC. On June 6, 1994, Johnson brought a similar suit against the same defendants, in addition to a number of other individuals. Fontana and Johnson sued the defendants for violating their rights under numerous provisions of the United States Constitution, California law, the NALC Constitution, the LMRDA, and other federal laws.

The district court granted summary judgment in favor of all of the defendants. Johnson and Fontana appeal the grant of summary judgment with respect to their free speech and procedural due process claims arising under the NALC Constitution and the LMRDA. We consolidated their appeals.

II.

We review the grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998). In doing so, we must determine, viewing the evidence in the

light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

III.

Fontana and Johnson claim that the Felde, MacDuffee, and Rotcher charges violated their due process rights under the LMRDA because the charges failed to include any factual detail. The LMRDA requires that a union member subject to discipline be "served with written specific charges."[2] 29 U.S.C. § 411(a)(5)(A) (1999). Although mindful that "federal policy favors allowing a union to govern its own affairs," *Wellman v. International Union of Operating Eng'rs*, 812 F.2d 1204, 1205 (9th Cir.1987), we agree with Fontana and Johnson, and conclude that the charges were too general to satisfy § 411(a)(5).

The Supreme Court has interpreted § 411(a)(5) to require that charges be " 'specific enough to inform the accused member of the offense that he has allegedly committed.' " *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971) (quoting Labor-Management Reform Legislation: Hearings Before a Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong.,

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[2] No member of any labor organization may be . . . disciplined . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5) (1999).

1st Sess., pt. 5, 2285 (1959) (statement of Senator McClellan)). Although case law suggests that a charge need not include the particular provision of a union constitution or by-law that has allegedly been violated, *see Hardeman*, 401 U.S. at 244 ("[A] union may discipline its members for offenses not proscribed by written rules at all. . . ."); *Frye v. U.S.W.*, 767 F.2d 1216, 1223 (7th Cir.1985), *Hardeman* seems to require that the charge include some sort of statement of the facts:

> [T]he transcript of the union hearing indicates that the notice did not confine itself to a mere statement or citation of the written regulations that *Hardeman* was said to have violated: the notice appears to have contained a detailed statement of the facts relating to [the incident] that formed the basis for the disciplinary action. Section [411(a)(5)] requires no more.

Hardeman, 401 U.S. at 245.

This circuit has addressed the issue of specificity once before.[3] In *Bise v. IBEW Local 1969*, 618 F.2d 1299 (9th Cir.1979), nine union members brought suit pursuant to the LMRDA, alleging, among other things, that they were fined in violation of § 411(a)(5). *See id.* at 1302. We briefly addressed the plaintiffs' contention that the charges were not specific enough to satisfy § 411(a)(5), and found the

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[3] The Branch argues that this circuit applies only a minimal standard to the assessment of specificity. The case cited by the Branch, and relied upon by the district court, however, goes to whether the provisions the accused is charged with violating are too vague – not the charges themselves. *See Perry v. Milk Drivers' & Dairy Employees' Union*, 656 F.2d 536, 539 (9th Cir.1981).

argument to lack merit.[4] We wrote, "[w]e believe that the charges were specific enough to inform the plaintiffs, with reasonable particularity, of the details of the alleged violations." *Id.* at 1306 n. 10; *see also Berg v. Watson*, 417 F.Supp. 806, 810 (S.D.N.Y.1976) ("[T]he notice must 'be so drafted as to inform a member with reasonable particularity of the details of the charges.' " (quoting *Jacques v. Local 1418, ILA*, 246 F.Supp. 857, 860 (E.D.La.1965))).

The lesson that can be gleaned from *Hardeman* and *Bise* is that a union disciplinary charge must include a statement of the facts describing the incident on which the charge is based. The Seventh Circuit has also adopted such a rule: "[t]he written charges should contain 'a detailed statement of the facts relating to the [incident] that formed the basis for the disciplinary action.' " *Frye*, 767 F.2d at 1222 (quoting *Curtis v. IATSE*, 687 F.2d 1024, 1027 (7th Cir.1982) (quoting *Hardeman*, 401 U.S. at 245)) (alteration in original).

This is not to say, however, that we hold union members to the standards required of a practicing attorney by requiring a highly technical statement of the facts. For example, the required specificity does not rise to the level needed for a criminal indictment. *See United States v. IBT*, 19 F.3d 816, 823 (2d Cir.1994); *Curtis*, 687 F.2d at 1027; *cf. Wellman*, 812 F.2d at 1205 (declining to require of disciplinary proceedings the same protections found in criminal proceedings because "a union has a significant

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[4] The *Bise* decision did not describe the disputed charges.

interest in controlling internal discipline").[5] Instead, an informal written statement of facts suffices. *See Magelssen v. Local Union No. 518, Operative Plasterers' & Cement Masons' Int'l Ass'n*, 233 F.Supp. 459, 461 (W.D.Mo.1964) (noting that "[n]o technical formalities should be imposed . . . but some factual assertion, no matter how informal, is necessary to allow an accused member to prepare his defense"). The level of detail required is that needed to notify the accused of the incidents that form the basis of the charge so that he or she may prepare a defense.[6]

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[5] That is, a charge need not apply the underlying facts to the particular constitutional provision or by-law alleged to have been violated. *See Curtis*, 687 F.2d at 1027. Similarly, the charge does not need to allege facts sufficient to support the charge or the particular elements of the charge. Instead, the goal is to give the accused member notice of the conduct that he or she is expected to defend.

[6] For example, in *Gleason v. Chain Service Restaurant*, 422 F.2d 342 (2d Cir.1970), the plaintiff was charged with "collecting money 'from members of the union' as dues and initiation fees and failing to turn it over to the union treasury." *Id.* at 343. The Second Circuit found the inclusion of rather general dates – "the events 'took place during 1965, 1966, and 1967' " – and the companies whose employees were involved not to satisfy the specificity requirement. *Id.* The inclusion of allegations that "at least twice in 1965 Gleason did not turn over $30 initiation fees, and that on several occasions, no date specified, he retained the $10 dues," also did not provide sufficient detail. *Id.*

Another example is *Berg*, in which the plaintiff was charged with failing to carry out an order given him by the union business agent on or about a particular day. *See* 417 F.Supp. at 808 The court found that including the date was insufficient in this case because

> the passage of time between the alleged offense and Berg's receipt of the notice, when combined with the

Applying these principles to the case before us, we conclude that the charges brought against Fontana and Johnson did not comply with § 411(a)(5). The charges mention abstract allegations, but fail to cite any specific examples. For example, the Rotcher charge against Fontana states in part:

> You have exceeded your authority and acted without and contrary to the authorizations of the Executive Council and the membership. You have continually subverted the will of the membership and publicly claimed that you do not recognize its authority in Branch meetings. You have attempted to turn other members against the Branch through lies, misrepresentation of the facts, and political campaigning on so-called "station visits." You have made politically motivated decisions affecting the Branch to its detriment in retribution against those with whom you disagree or perceive as political enemies.

Although these allegations make an overarching charge of misconduct, they lack any factual detail that would give Fontana notice of the specific actions he had to defend. For example, in preparing his defense, it would have been useful for Fontana to have known when certain

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> number of orders received by him, rendered [the date] of little consequence. No reference whatsoever is made to the content of the order or to the place where the order was given, although this information was apparently within the knowledge of Berg's accusers. . . .

Id. at 811.

events supposedly occurred, what lies or misrepresentations were allegedly made, or how Fontana acted contrary to the Executive Council's authorization. In the absence of any statement of the facts, Fontana could not be expected to present a defense, save for a general denial of any misconduct. The Rotcher charge's reference to the filing of frivolous charges, although a more specific allegation, also fails to include pertinent information such as against whom the charges were filed or approximately when.[7]

The MacDuffee charge against Fontana also fails to set forth any facts concerning its general allegations. For example, the MacDuffee charge states "[y]ou have used

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[7] The Rotcher charge against Johnson is very similar and suffers from the same defects. Lack of factual detail plagues the Felde charge with respect to both Fontana and Johnson as well. The Felde charge against Fontana states in full:

> This is a notification of charges against you done in accordance with Article 10 of the National Constitution of the NALC. I am hereby charging you with:
>
> Misconduct
>
> Over the past 9 months you have been a disruptive factor in the operation of Branch 1100. You have repeatedly and continue to file false and frivolous charges against members of Branch 1100. The time and resources of the Union have been wasted by your irrational and irresponsible conduct. It is obvious to me that you are not working in the memberships best interest and in fact are trying to destroy the union.
>
> I hereby propose that an assessment be imposed on you for all expenses incurred by the Branch because of your frivolous charges that you have repeatedly filed.

your position and influence, and you have made promises of Vice Presidential positions to members, in exchange for their support of your actions and to carry out your vendetta against the remaining elected Branch officers." MacDuffee does not mention to whom Fontana allegedly made promises, or how Fontana has misused his influence.[8]

Upon finding charges to be insufficiently specific, some courts require the disciplined member to "demonstrate that he was misled or otherwise prejudiced in the presentation of his defense" to establish a violation of § 411(a)(5). *See, e.g., Frye*, 767 F.2d at 1223; *Waring v. ILA, Local 1414*, 653 F.Supp. 374, 378-80 (S.D.Ga.1987). *But see Berg*, 417 F.Supp. at 811 (noting that awareness of underlying facts independent of the charges themselves cannot cure inadequate written notice).[9] These courts derive their prejudice requirement from the Supreme Court's statement in *Hardeman* that § 411(a)(5) "empowers the federal courts to . . . determine whether the union member has been misled or otherwise prejudiced in the presentation of his defense." 401 U.S at 245. In *Hardeman*, the Court was presented with the issue of whether a court could interpret a union regulation for the purpose of

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[8] The MacDuffee charge against Johnson is virtually identical, and suffers from the same defects.

[9] It is unclear whether this court has adopted a prejudice requirement. In *Bise*, we stated: "[w]e believe that the charges were specific enough to inform the plaintiffs, with reasonable particularity, of the details of the alleged violations. Moreover, there is no evidence in the record to indicate that the charging letters misled or compromised the defense of any plaintiff." 618 F.2d at 1306 n. 10.

determining whether an offense for which a union had disciplined a member was within the scope of the regulation. *See id.* at 242-43. In holding that courts may not do so, the Court remarked,

> [t]hese charges must be, in Senator McClellan's words, "specific enough to inform the accused member of the offense that he has allegedly committed." Where, as here, the union's charges make reference to specific written provisions, [§ 411(a)(5)(A)] obviously empowers the federal courts to examine those provisions *and determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense.* But it gives courts no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all.

Id. at 245 (footnote omitted) (emphasis added).

Fontana and Johnson do not allege with particularity how they were prejudiced; they merely state in their briefs that "[t]he failure to include any [factual detail] made it impossible for Appellant to prepare a response to the allegations." To the extent that prejudice is required under *Hardeman*, we conclude that the absence of any factual detail renders a charge inherently prejudicial. Without any mention of the facts underlying the charges, Fontana and Johnson could not have been expected to have alleged prejudice with any more specificity than to say that they could not adequately defend themselves because the charges were too general. We "cannot assume an accused is guilty, with knowledge of his own dereliction." *Gleason*, 422 F.2d at 343.

In sum, we hold that § 411(a)(5) requires a written statement of facts sufficient to put the accused on notice of the conduct that he must defend. The Felde, Rotcher, and MacDuffee charges were not sufficiently specific because they failed to include any such statement of the facts. We further hold that, to the extent a showing of prejudice is required, an absence of factual detail is sufficiently egregious to render the charges inherently prejudicial. Therefore, we find that the district court erred in granting summary judgment to the Branch defendants on this claim.

IV.

We reverse the district court's grant of summary judgment to the Branch only on the ground that the charges brought against Fontana and Johnson were insufficiently specific to comply with § 411(a)(5) of the LMRDA and remand for further proceedings consistent with this opinion. In our separate, unpublished disposition filed concurrently with this opinion, we affirm the district court's grant of summary judgment on all other grounds raised by Fontana and Johnson on appeal. Fontana, Johnson and the Branch shall each bear his, her or their own costs on appeal. The NALC shall recover its costs on appeal from Fontana and Johnson.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

TRANSCRIPTION OF AUDIO TAPE

December 11, 1998

HEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Re: *Johnson v. National Association of Letter Carriers Branch 1100, etc.* Case No. 97-55844
and
Fontana v. National Association of Letter Carriers Branch 1100, etc. Case No. 97-55911

[p. 1] **Transcription of one audio tape**

Re: *Johnson v. National Association of Letter Carriers Branch 1100, etc.* Case No. 97-55844
and
Fontana v. National Association of Letter Carriers Branch 1100, etc. Case No. 97-55911

HEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Diener: I'd like to reserve most of my time for rebuttal and not take up any more of the Court's precious time. I thought the briefs thoroughly addressed most of the issues. The one thing I did want to address is there does appear to be an issue of first impression before the court and that's in regards to what is the proper procedure for a Union to follow or National Union when they receive an appeal. In this case, had the National upon receipt of the appeal of the appellant investigated and processed the appeal properly, clearly under case law that wouldn't result in a claim being made. In this case, nothing was done. The appeal wasn't even acknowledged. They acknowledged they received it but no investigation was done. And we've been unable to find any

case law which exempts them or creates a situation where that is not ratification of the content of that apepal.

Moreover, there's a separate issue of whether or not the failure to even process that appeal is in and of itself a due process violation under the NALC Constitution. Clearly, it's required. Clearly the Constitution states that they have to go ahead and process it and give a response. You know, they don't have to agree with it but they have to give a response. And by failing to do [p. 2] that, it's a direct violation of the due process provisions of that Constitution.

Judge: Do you think that National Constitution extends the right to de novo review on appeal so that the National becomes a fact finder?

Diener: Uh, Your Honor, I believe that it allows them to do that. They are not required –

Judge: You said they **must** do it. Well that –

Diener: They must look at the facts contained in the appeal, as far as I'm aware.

Judge: Facts or allegations?

Diener: Uh, the facts, Your Honor. I can read the –

Judge: Well the Local makes fact finding.

Diener: Correct, Your Honor –

Judge: It makes fact finding and it makes a determination and they did in this case.

Diener: And then it's up to the National to at least look at those to determine what should be done,

whether they were, whether it's something that the National should intervene in and go ahead and say, "No, this is wrong" or not.

Judge: Well, do you have to exhaust your remedies before the National before you come to the courts?

Diener: Uh, yes, Your Honor.

Judge: Did you?

Diener: Yes, Your Honor.

Judge: Did you ask for some kind of decision?

Diener: Yes, Your Honor.

Judge: And they refused the decision?

[p. 3] Diener: Yes, Your Honor.

Judge: By what authority?

Diener: Uh, they –

Judge: The Board? The Board refused to do anything.

Diener: Yes, Your Honor.

Judge: But just an officer?

Diener: They submitted letters to – One, they submitted official appeals pursuant to the procedures of the NALC –

Judge: Right.

Diener: – to the Constitution as well as there's substantial letters informing them of everything going on throughout the entire course of this.

Judge: No, I'm talking about the appeal.

Diener: Okay, Your Honor. They pursued those. They mailed them certified letter. They got them. I don't think it's disputed that they got them. It's just disputed that they didn't do anything.

Judge: Okay.

Diener: Thank you, Your Honors.

Judge: Okay thank you. We're going to have what? Just one argument on behalf of the uh –

Mr. Feinberg: No, Your Honor, we will split our time.

Judge: All right.

Mr. Feinberg: Good morning, Your Honor. My name is Michael Feinberg. I am the attorney for the National Association of Letter Carriers, AFL-CIO, the National Union, which we will refer to as the NALC as opposed to the Branch or Branch defendants. I'm a little surprised that we are confronted with an issue of First Impression [p. 4] since it wasn't argued below and it hasn't been argued in the briefs that there is some additional obligation on the part of the National Union to conduct an investigation that is beyond the scope of what is required by the National's Constitution. The LMRDA leaves it to Unions to develop their own rules and regulations for their internal management so long as those rules and regulations are reasonable. And I had not seen anyone in this litigation challenge the Constitution of the NALC as being unreasonable or in any way deficient. It has only been the conduct of the defendants and the

appellees here within the framework of that Constitution that has been challenged.

Judge: Did the National respond to the appeal?

Mr. Feinberg: There are a number of appeals and yes, the National responded to most but not all of the appeals and I want to address that issue in particular. There are, let's take them separately.

There were three, uhm, there were two appeals by Mr. Fontana or two sets of appeals by Mr. Fontana. One concerned his removal from office as President of Branch 1100 and on that appeal the National Union responded and said that the Branch's actions were appropriate and denied the appeal. Actually there were three appeals. I'll take that back.

Then there is a second appeal in October of 1993 where Mr. Fontana is claiming that it is a violation of the National Constitution for the Branch to suspend him from membership. And the NALC Committee of Appeals responds and says, "You're right. On the basis of the allegations that they are charging you with, it is inappropriate and wrong for the Branch to suspend you from membership and we uphold the appeal."

[p. 5] Now, at the very same time that they are considering this appeal, a second appeal on identical charges is filed by Fontana with the National Union. And it is identical charges with identical results, that is, that Mr. Fontana would be suspended from membership in the Branch for a period of one year.

It is true that there is no response from the National Union in the record. And it would be preferable,

I will admit, that for the record that the National Union had responded. The record is that the National Union believed it was responding to the suspension issue on the identical charge and was upholding the appeal. And a similar situation occurred with regard to Appellant Johnson.

Judge: Well, would you argue there's an exhaustion problem or not?

Mr. Feinberg: I would not say that there is an exhaustion problem.

Judge: Okay, so that you can appeal to a National Union and get no result and still sue them? That's the rule of law that you want us to lay down?

Mr. Feinberg: I believe that if you do not get a response from the National Union that, within a reasonable period of time, that you have a right to bring a lawsuit, that's correct.

Judge: Okay.

Mr. Feinberg: We would not say that you have to keep knocking on the door and say, "Please answer us" that, you know, and not get a response. No, I wouldn't say that. We would say, however, that they did get a response and that the response was on the subject of the issues presented in both of those latter appeals, the response was to uphold the appellants' contention that the Branch should not have [p. 6] suspended the membership of either of the appellants.

Having said that, it's hard to find any kind of basis for ratification because what's clear is that to the extent that the National Union was expressing its intent

with regard to the type of charges at issue, that intent expressed was to reverse the Branch's actions. You can't say, based on identical charges that are non response constitutes ratification. Counsel says that he's found no cases that say that that isn't ratification but he hasn't found a single case that says that it is ratification. I think that was very charmingly worded on his part.

What we submit is that you look at what's been submitted. Are these factual, are these facts that the National Union can look at and say – We now have complete and full knowledge of what's gone on – or are they factual allegations? And in fact they're factual allegations and the case that both sides have cited to the Court, the *Brenner vs. United Transportation*, sorry, that is *Brenner vs. Carpenters' Local 514* case from the Third Circuit. In that case it's quite clear that there's nothing to require the NALC to credit one side to the other. We just have statements, unsworn statements brought out by both sides. The NALC could believe one side, disbelieve the other, make a ruling, and it wouldn't be ratification of either position.

Judge: Can I change the subject just a little bit?

Mr. Feinberg: Sure.

Judge: The claim is made that the Branch failed to include in a specificity in the charges against both officers.

Mr. Feinberg: Yes.

Judge: Is that the subject matter that is legitimately [p. 7] reviewed at the National level on an appeal

or is this a question that the courts are going to stick their nose into?

Mr. Feinberg: No, I think that the National Union could look to see if there's been a, at least take a first look and see if there's been sufficient specificity of the charges and then decide –

Judge: Right, in this case –

Mr. Feinberg: – whether or not the Constitution –

Judge: – has the National dealt with that claim?

Mr. Feinberg: I would say they dealt with it in an abbreviated fashion, that they said that with regard to the charge against Mr. Fontana, that they, if you look at the, it's in the record, the two-page response to the appeal, it basically says that the record is adequate, that there's been a, the charges had been properly drawn, that the committees that did the investigation were properly constituted, that notice was given, that opportunity to respond was had and that all forms of due process were met and that therefore there was no violation of the Constitution in the removal of Mr. Fontana from office.

Judge: If we were to determine that was insufficient, by what standard would we review the charging documents?

Mr. Feinberg: If they were to determine that that had been insufficient, we wouldn't be here because if they had determined that it had been insufficient –

Judge: They'd dismissed –

Mr. Feinberg: They would've reversed the decision. There is a couple of things I'd like to add but I don't want to use up my co-counsel's time. Have I used up ten minutes yet, Your Honor?

Judge: Don't you have a clock right in front of you?

[p. 8] Mr. Feinberg: Yes. I think I'd like to –

Judge: No, it –

Mr. Feinberg: I have two more –

Judge: It's working down, it's working down so you have two minutes.

Mr. Feinberg: I have two more minutes left so let me do that. It seems that in the papers that the appellant has made considerable time arguing timeliness issues in terms of Statute of Limitations and frankly there isn't one, at least as it pertains to the National Union. We have only had a ruling from the District Court as to Statute of Limitations under 301 and only as it pertains to the claim arising concerning the breach of Union Constitution.

The District Court did not make any ruling as to the applicability of § 10(b) of the National Labor Relations. Act to the LMRDA. The issue as to whether or not the *Reed* case would have properly covered the situation is not raised here because that is not the court's ruling below. And since the LMRDA issues survive and are dealt with in substance by the district court, we really don't have to address Statute of Limitations issues at all on appeal.

There is an issue as to whether or not the National Union committed a direct violation of the Union Constitution by not responding to those two claims, those two appeals that we were talking about earlier. And I would submit to you that this is not an issue that was litigated below. It is not an issue raised in the pleadings. Every time the issue of these two appeals that were not responded to is raised, it is raised in the context of ratification, that is – Did the National Union by not responding to these specific two appeals evidence intent to ratify the Branch's conduct? In no [p. 9] way, does that constitute a direct violation.

We have had the statements of the plaintiffs'-Appellants' counsel in their briefs below that they were going on a strictly on a ratification theory and the question is – Does our conduct ratify the conduct of the Branch? – not whether and there is no case raised whether we committed a direct violation of the Union Constitution. I would say in that regard that if the Court were to find that that is an issue in this appeal, first that there is no underlying violation of the Union Constitution by the Branch, which is well documented by the district court, and I'll leave that to the Branch's counsel to further elaborate on, but beyond that, the result of those two charges from which there was no response to the appeal, is that the plaintiffs-appellants would have been suspended from their membership for a period of one year.

Judge: All right, Mr. Feinberg, your side has about nine Minutes left.

Mr. Feinberg: Okay. I just would add that they never started paying their dues again. They would have

been suspended anyway from their membership. So it would have been moot.

Mr. Mathias: All right. Good morning, Your Honors. Rich Mathias on behalf of the Local Branch 1100 and all of the individual defendants. I do not want to reiterate what I have already written in the brief on behalf of my clients, but simply, I want to simply add two things to what my co-counsel has stated. The issues that are presented here are really ones that can be clearly decided based on the trial court's decision that substantively on the merits, the plaintiffs never made their case. There was never a triable issue on the merits. The appellant tried a lot of drafting of pages of [p. 10] confusing language, of raising Statute of Limitations and other little hooks and bells but the issue that, the narrow basis for a decision to affirm, really is that substantively there was never a triable issue of fact and that issue is one the appellants do not address anywhere in their briefs.

Now our position has been and always has been that the applicable law indicates that the free speech claims of the two appellants and the due process claims on the merits clearly could not have survived because there is no evidence to support any of them.

The other issues that we briefed and if the court has no questions, I'm not going to relay what we wrote are the state law claims, and that is that the district court reviewed those claims and disposed of them properly pursuant to its authority under the supplemental jurisdiction of the court.

Judge: Would you take a minute as to both Johnson and the other one as to the specificity of the charges brought by the Branch.

Mr. Mathias: Sure. The uhm, one of the four issues that the appellants raised about the charges was whether or not the charges were specific. And our position, I think the district court adopted fairly consistently, was that the purpose of the charge is to simply advise the person being charged of what they're being alleged to have done. And the appellants, if you read their pleadings throughout the court, in the lower court proceedings, they want an annotated detailed description of every single act and breath that the charging parties thought were improper and they want date, time, place and every single act.

Female: We want the facts. That's what they asked for.

Mr. Mathias: They asked for a detailed log of everything. The [p. 11] Constitution of the NALC and the cases that have looked at this issue are very clear, that you don't have to be specific as to the facts of everything going on but the language is the person charged has to be put on notice generally of the actions that they're being asked to defend against.

Judge: Well the district court and this court of course are bound by § 411(a)(5) of the LMRDA, right?

Mr. Mathias: That's right.

Judge: And that says – Fail to identify whom? What conduct? Where? When? and so on.

Mr. Mathias: Right. And the charges in this case were very, as far as I could read them, detailed, typed out descriptions of the conduct and the behavior of the president and the officers that were being objected to.

Judge: You're taking, it doesn't give dates or names, does it?

Mr. Mathias: It doesn't give dates, or it does give names and there are dates in terms of uh by month. It's not probably a date specific in terms of the 5th of July but it was simply referred to, for example, as the Health Benefit Seminar and all of the members knew when that was. These are things that have –

Judge: But what about this one says "over the past nine months"? What is that supposed to mean without naming any names.

Mr. Mathias: Well, that isn't certainly specific enough in terms of the type of charges over the past nine months the two officers engaged in behavior that was just something you didn't ___.

Judge: "You've been disruptive over the past nine months." You think that's specific?

[p. 12] Mr. Mathias: Well, that particular one is specific to that charge, yes. It's not specific enough in terms of saying, you know, what the person did every time but it's specific enough to put the person on notice that over the past nine months they have engaged in behavior that was wasteful of the Union funds. And I think to that extent, they are put on notice of what they have to defend against. And I think that the fact that they used "over the past nine months" is an indication that

they're being given advance notice of a broad range of allegations so they can prepare themselves. And that's the whole purpose of the statute is to allow the person to prepare themselves and to defend themselves against the allegations. And certainly I think this court needs to I think look in the context of what was going on here at the local Branch.

The specificity requirement is one that has to be read in the context of what the Branch is doing. This is one of the largest branches in the country but every single officer is embroiled in this conflict. And every single officer knows that what is going on in terms of what the people are being accused of. And so it's not necessary to annotate every single issue because Mr. Fontana and Ms. Johnson were in the thick of things. And their phones were ringing off the hook. They had a chance to go to the hearings They didn't go to them. They had a chance to defend themselves, they decided not to go. I think that the court needs to look in the context of the overall events that were transpiring. And I think overall substantively they received a tremendous amount of due process on that issue.

Female: Suppose we find that it's not, the charges are not specific enough? What do we do then? Do we send it to the district [p. 13] court and say, "Find out if these people knew?" Or does the district court make a determination as a matter of law at that point as to what the answers are? Is there to be a trial? And if so, a trial about what?

Mr. Mathias: Well, no, I think if this court were to find that the charges were not specific enough, then I

think the next inquiry must be if they weren't specific enough, were they afforded due process in general? And did the appellants engage themselves –

Female: In other words, did they have sufficient notice?

Mr. Mathias: Exactly. Did they engage themselves in a manner that was showing their good faith effort to defend themselves. See, that's critical here because these two appellants didn't work this process. They bucked it at every turn. They were asked to come to hearings to give their side of the story, they decided not to go. I think that the whole defense approach here has been to simply knit-pick each of the different elements of the accusations. If this court were to believe the charges were not specific enough, I would ask that the totality of the circumstances be reviewed for fairness to them and fairness to the appellants as every step of the process and ask yourselves – Did they engage and participate in that process in a manner that was reasonable and not in a manner that was designed to set them up to fail? Do you have any questions?

Judge: Thank you.

Diener: Thank you, Your Honors. I find all this very educational and very interesting to me. This is all very new. I'm stricken of a maxim, you know, what are rules there for? Rules are there for rules. That's the rule of law. It seems both the national and the local want to just kind of ad hoc, argue equity. They have [p. 14] got notice. They may not have. You know, things were going on. Here's the rule. The rule says, "Mo [sic] member of any labor organization may be fined, suspended, expelled, or

otherwise disciplined except for non-payment of dues by such organization thereof unless such member has been (a) served with written specific charges, given reasonable opportunity to prepare and afforded a full and fair hearing." It seem sot me without getting names, dates, places, general allegations of, "You guys were causing problems." That's not notice enough to prepare defense. Were they supposed to show up and say, I mean the sum total of what their response would have been, "Oh no, we weren't doing anything wrong." Without knowing what they were doing wrong, how would they be able to prepare a defense against that? Uh, moreover, they were trying to participate at every step of the way. There's other due process violations and free speech violations which haven't been addressed but were touched upon.

One important one, they weren't allowed to have witnesses present when they were being interviewed by the Lavicki, by the committees conducting the investigation. It flatly says, "You have a right to have a Union member there with you." It says it as a rule. They were denied that opportunity. Many times they asked, "Can I have Mr. Fontana there?" And more importantly, it was even more important to have them there, Mr. Fontana there, because they were both involved in the accusations. It just, there's a whole myriad of things I'm not going to go through that were in the briefs of how they were denied due process and free speech. And while they seemed to be minimalized here today, I trust that the court would see back then they weren't minimal. I mean these people were, you know, doing the best they could to perform their job and were getting shot [p. 15] down every step of the way.

The last thing is just merely *Brenner*. Quickly the National argued that this wasn't, uh, that the issue of direct violation was not raised at the lower court and that's clearly not the case. In their moving papers, the plaintiffs, I cited at my reply brief, the plaintiffs waited in vain for a response to these charges. They were never reviewed by the NALC in direct contravention of the NALC Constitution. Simply stated, that's a violation of the Constitution. Failure to return a response to the charges – they weren't identical charges. They were brought by three different people against the plaintiffs. They weren't identical. To come back later and say, "Oh well you should've known." That's not the rule of law. The rule of law is you give a response. That's what they're required to do.

And the last thing was in *Brenner* is very analogous it seems to this case, Your Honors, the failure of the National to respond to members' appeals was not a ratification in that case because the issue of the appeal had already been resolved by the Branch prior to the appeal being received by the National. That's what the court found at Page 1289 of that case. And in this case it's distinctly different. Nothing was done. In *Brenner* they responded at least where the issue was resolved before they had to respond. Here, nothing was resolved and no response was given. I mean clearly this would allow the National in any given case just to lose an appeal and nothing could be done about it.

Judge: On the other hand, you're advocating a rule – If you don't hear from them next week, you can go to federal court or next month or –

[p. 16] Diener: Well it's four months, Your Honor, and they did wait the proper four months as required under the LMRDA. That is in the brief. I put that in there. There's a four month period which allows – If you don't hear back in four months, your year starts to toll from then. But to give them justification here, now later what are you going to be able to pursue them for because they wouldn't have an obligation to come back and give you an answer anyway. It leaves a remedy list for that four month tolling. They have to, I mean it seems that it would allow them not to ratify any conduct by just not responding.

Judge: I understand your argument.

Mr. Diener: Thank you, Your Honor.

Judge: All right. Thank you very much. This case then is submitted for decision. Last case for this morning's calendar will stand in adjournment.

DECLARATION

I, Elizabeth Smetana, declare that the foregoing is a true and correct transcription of one audio cassette tape of an Hearing before the United States Court of Appeals for the Ninth Circuit in the matter of *Johnson v. National Association of Letter Carriers etc.* No. 97-55844 and *Fontana v. National Association of Letter Carriers etc.* No. 97-55911.

I have transcribed the tape verbatim to the best of my ability and it is as close to correct as I could make it.

I have no personal interest whatsoever in the outcome of this matter. If called upon, I would be competent to testify as to the above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Irvine, California, this 21st day of September, 1999.

/s/ Elizabeth Smetana
Elizabeth Smetana
LAW OFFICE PERSONEL SERVICE, INC.
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29 U.S.C. § 411

Labor Management Reporting and Disclosure Act

SUBCHAPTER II – BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from

conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except –

> **(A)** in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or
>
> **(B)** in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such

labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time

to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect. (Pub.L. 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522.)

CONSTITUTION

of the

NATIONAL ASSOCIATION OF LETTER CARRIERS

of the

UNITED STATES OF AMERICA

As amended at the Fifty-Sixth Convention
Portland, Oregon
August 7 – 12, 1988

Washington, D.C.
October, 1988

* * *

ARTICLE 11

Committee on Appeals

Sec. 4(a). The Vice President, Secretary-Treasurer, and Chairman of the Board of Trustees shall constitute the Committee on Appeals. They shall examine all appeals and grievances that may arise in the National Association, and all appeals and grievances that may be taken from a State Association, or from a Branch to the National Association, or between individual members thereof, except those involving questions of law upon which the National President has ruled, as may be referred to them in accordance with the laws of this Association. They shall notify the appropriate Branches, State Associations, the appellant, and the President of their decision. They shall make a written report summarizing their activities at each national Convention.

(b). any determination of the Committee on Appeals can be appealed by any aggrieved member, Branch, or State Association to the National Convention. To perfect such appeal, the aggrieved member, Branch, or State Association must, no later than sixty (60) days prior to the National Convention, file with the Committee on Appeals, by registered mail, a notice of appeal, together with a full written statement of the reasons why the appeal should be granted; if the decision of the Committee on Appeals is not rendered until sixty-five (65) days or less prior to the National Convention, the notice of appeal and statement of reasons must be filed as soon after receipt of the decision as is reasonably possible.

* * *

ARTICLE 17

Litigation

Section 1. The National Association is authorized, upon affirmative vote of the Executive Council, to pay all the expenses for investigating services, employment of counsel, and other necessary expenditures in any cause, matters, case, or cases where an officer, representative, employee, agent, or one charged with acting in behalf of the National Association is charged with any violation or violations of any law or is sued in any civil actions with respect to any matter arising out of his/her official duties; except if such officer, representative, employee, or agent is charged with a breach of his trust to the National

Association or any subordinate body or member thereof, in which event he/she may be indemnified if the action is terminated favorably to him/her.

Sec. 2. Neither the National Association nor any of its officers shall be responsible or liable for the wrongful or unlawful acts of any Branch or State Association, or officers, members, or agents thereof, except where the National Association or its officers have actually participated in or actually authorized such acts, or have ratified such acts after actual knowledge thereof.

Sec. 3. No branch shall institute litigation in any court against the United States Postal Service or any successor organization to enforce, set aside, or declare the proper interpretation of any provision of a National Agreement between the Association and the United States Postal Service, except with the written approval of the National President.

No. 99-571

IN THE
Supreme Court of the United States

E. JEAN JOHNSON and BASILIO FONTANA,
Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In the decision below, the Ninth Circuit correctly declined to note the issue, raised for the first time on appeal, of whether the National Association of Letter Carriers, AFL-CIO violated the procedural due process rights guaranteed to union members under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 401 *et seq.* and the Constitution of the NALC ("NALC Constitution") when it did not respond to each and every appeal taken by Petitioners Johnson and Fontana to the NALC Committee on Appeals. The following questions are therefore raised by the Petition:

1. Whether the Ninth Circuit Court of Appeals was correct in holding that an issue raised for the first time on appeal was properly rejected.

2. Whether, as the Courts held below, the NALC did not ratify the disciplinary actions taken against Petitioners by Branch 1100 and Petitioners have no further claims against the NALC.

3. Whether the issues raised by Petitioners are moot.

LIST OF PARTIES

Petitioners:

E. Jean Johnson
Basilio Fontana

Respondent:

National Association of Letter Carriers, AFL-CIO

Other Defendants in District Court Appeal:

National Association of Letter Carriers, Branch 1100

Arthur Turner
William Heintz
John Wellen
Howard Kashinsky
John Jackson
Charles Miller
Thomas Coladonato
Kirk Baiz
Richard Misner
Norberta Fullen
Bonnie Lippincott
Richard Felde
Bruce MacDuffee
Michael Rotcher
Barbara Stickler

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IN THE

Supreme Court of the United States

No. 99-571

E. JEAN JOHNSON and BASILIO FONTANA,
Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent National Association of Letter Carriers, AFL-CIO ("NALC") respectfully opposes the Petition for a Writ of Certiorari filed by E. Jean Johnson and Basilio Fontana ("Petitioners").

OPINIONS AND ORDERS BELOW

In its Orders of May 2, 1997 (Johnson) and May 13, 1997 (Fontana), the District Court granted Respondent's Motions for Summary Judgment. The District Court's Orders were upheld on appeal by the Court of Appeals for the Ninth Circuit in a Memorandum Opinion issued on July 2, 1999.

JURISDICTION

The instant Petition for Writ of Certiorari invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subchapter II of the Labor Management Reporting and Disclosure Act (Bill of Rights of Members of Labor Organizations), 29 U.S.C. § 411.

STATEMENT OF THE CASE

On May 10, 1994, Petitioner Basilio Fontana commenced an action in the United States District Court for the Central District of California, entitled *Basilio Fontana v. National Association of Letter Carriers, Branch 1100, et al.*, USDC Case No. CV 94-3024 CBM, naming National Association of Letter Carriers, AFL-CIO ("NALC"), National Association of Letter Carriers, Branch 1100 ("Branch 1100") and various Branch 1100 officers as Defendants. On June 6, 1994, Petitioner E. Jean Johnson commenced a nearly identical action against the same Defendants, entitled *E. Jean Johnson v. National Association of Letter Carriers, Branch 1100 et al.*, USDC Case No. CV 94-3765 CBM.

The District Court entered Judgment in favor of the Respondent in the *Johnson* matter on May 6, 1997 and in the *Fontana* matter on May 13, 1997. Both Johnson and Fontana filed timely appeals. The Ninth Circuit affirmed the District Court findings in favor of NALC in an unpublished Memorandum Opinion issued on July 2, 1999.

NALC is a national union that represents over 300,000 letter carriers employed by the United States Postal Service. NALC has as its components 50 State Associations and numerous affiliated local unions, called "Branches."

NALC members are also members of one of NALC's affiliated local Branches. The Branches are distinct, self-governing organizations, which elect their own officers, hold property, and hire, fire and supervise their own employees. Branches are subject to NALC's overall authority in areas such as collective bargaining and the handling of grievances arising under collective bargaining agreements.

The relationship between NALC and its Branches is governed by tht NALC Constitution itself, by the NALC's Constitution for the Government of Subordinate and Federal Branches ("CGSFB"), and by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA", 29 U.S.C. § 401 *et seq.*). The NALC Constitution gives each Branch the right to adopt its own by-laws and to amend them as it sees fit, subject only to the requirement that they do not conflict with the NALC Constitution. Branch members have the right under the NALC Constitution and the LMRDA to elect their own officers, hire their own employees, maintain bank accounts and property under the Branch's control, and conduct the affairs of their Branch democratically. The duties of the National officers/agents are set forth in the NALC Constitution. NALC can intervene in a Branch's affairs *only* under the conditions provided for in Article 18 of the NALC Constitution and LMRDA § 302, 29 U.S.C. § 462. Branches are left to operate autonomously without interference from NALC.

Article 10 of the CGSFB provides detailed procedures for the handling and processing of internal union charges at the Branch level.[1] Appeals from Branch-level disci-

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[1] Article 10 of the CGSFB provides, in pertinent part:

Section 1. Any member of the Branch who shall violate the Constitution or By-laws of the [NALC] or Branch may

plinary actions are set forth at Artticle 11, Section 4(a)

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have charges preferred against him/her, and if such charges are proved shall be fined, reprimanded, suspended or expelled as the laws may direct or the Branch determine. Any officer of the Branch who shall fail or neglect to discharge the duties of his/her office, or who may be guilty of gross misconduct, may be removed from office. . . .

Sec. 2. Charges must be made in writing, specifying the offense, failure, neglect, or misconduct so as to fully apprise the member or officer of the nature thereof. . .; and a copy of said charges . . . shall be served upon him/her. . . .

Sec. 3. The president . . . shall then appoint a committee of three disinterested members, who shall forthwith summon the parties, hear and take down or cause to be taken down or recorded, the testimony and/or documentary evidence presented. It shall be the duty of the committee to find the true facts and report to the Branch. The parties are entitled to be heard by the committee, to present evidence, and to cross-examine all witnesses who make statements to the committee, but rules of evidence and rules of judicial procedure need not be observed. The committee, after completing its fact-finding duty, will present to the Branch a written report of the facts elicited, and immediately thereafter disband and be eligible to vote. The Branch shall then decide, by simple majority vote, the issue of whether or not the facts, as found by the committee, sustain the charge. The charged party is entitled to defend himself/herself before the Branch immediately before the vote is taken. If the Branch decides that the facts sustain the charge, then the Branch shall entertain a motion to fix the penalty, if any be required.

Sec. 4. If suspension be determined upon, the Branch shall fix the term of suspension. . . .

Sec. 5. During the suspension for an offense, a member is not exempt from dues, and he/she shall be subject to all the penalties of Article 7, Section 4. for the non-payment of the same.

Sec. 6. Any member or officer suspended for any offense shall be reinstated on the removal of the cause and the payment of all demands against him/her, or at the expiration of the term for which he/she was suspended . . .

Sec. 8. Any . . . Branch Officer . . . who, having first been charged under this Article with using or attempting to use the

of the NALC Constitution [2] and Article 11 of the CGSFB.

Fontana was a member of the NALC from July 1, 1962 to May 11, 1993: he served as a Branch 1100 Vice President from January 20, 1979 to December 30, 1988, and the President of Branch 1100 from December 31, 1988 to May 11, 1993. Johnson was a member of the NALC from November 1973 through October 1993: she served as Fifth Vice President of Branch 1100 from February 7, 1989 to January 28, 1991, and as Fourth Vice President from January 29, 1991 to October 1993.

A. The Charges and Appeals Regarding Fontana

1. *Charges Resulting in Fontana's Removal from Office as President; Fontana's Appeal Denied.*

On or about February 9, 1993, Fontana was served with internal union charges, dated February 8, 1993 (hereinafter referred to as the "February 8, 1993 Charges against Fontana"), alleging:

> 3. Gross Misconduct—Fontana was alleged to have verbally and abusively attacked Norberta Fullen, Branch 1100's Executive Secretary Treasurer/ Health Benefits Representative on November 13, 1992.

Branch, or any portion of it, or his/her influence therein, for political purposes, is determined by the Branch in accordance with the procedures prescribed in this Article to be guilty of the charge, shall be guilty of perfidy and shall suffer expulsion.

[2] Article 11, Section 4(a) of the NALC Constitution provides:

> The Vice President, Secretary-Treasurer, and Chairman of the Board of Trustees shall constitute the Committee on Appeals. They shall examine all appeals and grievances that may arise . . . from a Branch to the [NALC] . . . . They shall notify the appropriate Branches, . . . the appellant, and the President of their decision . . .

4. Failure to Carry Out Duties of Office and Neglect of Duty—Fontana was alleged to have gone to Las Vegas at Branch expense but did not attend meetings of the NACL Health Benefits Seminar on October 24-27, 1992.

5. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—Fontana was alleged to have refused to follow the directive of the Branch 1100 Executive Council to turn in Branch credit cards by December 20, 1992.

6. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—It was alleged that on January 5, 1993, the membership of Branch 1100 voted to uphold the Motions approved by the Branch 1100 Executive Council on December 29, 1992; and that Fontana, in his capacity as Branch President, declared this vote null and void. It was further alleged that Fontana improperly spoke to these Motions from the Chair.

7. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—It was alleged that on December 29, 1992, the Branch 1100 Executive Council adopted a motion giving itself the authority to appoint the Editor of *The Union Carrier* (the Branch's newsletter), and to assign the Editor exclusive editorial control over its contents. It was further alleged that on February 5, 1993, Fontana and Johnson instructed the printer to change the article scheduled to appear on the front page of the Februray/March 1993 issue to an article written by Fontana about his choice for 1992 Shop Steward of the Year. It was further alleged that Fontana instructed the printer that this was to be a February only issue, not the February/March issue designated by the Editor. It was further alleged that these acts would cost the Branch an additional $4,000.

On or about February 9, 1993, Fontana was served with a sixth internal union charge for "Perfidy," dated February 9, 1993, alleging that Fontana refused to assign Executive Secretary Treasurer/Health Benefit Representative Norberta Fullen to attend the Las Vegas National Health Benefits Seminar for personal political reasons.

Charge No. 1 of the February 8, 1993 Charges against Fontana was voted on by the Branch 1100 membership on March 9, 1993, with Fontana being found guilty as charged, and with a reprimand adopted as the penalty for this offence, to include a written apology by Fontana to Fullen to be read at the next two membership meetings. Thereafter, at an April 13, 1993 Branch 1100 membership meeting, Fontana stated that he would give Fullen a verbal apology and that he was sorry.

On May 11, 1993, the general membership of Branch 1100 voted to sustain all of the remaining charges against Fontana and approved his immediate removal from office as President as the penalty for such alleged misconduct.

On May 28, 1993, Fontana filed an appeal with the NALC Office of Appeals from the May 11, 1993 action of Branch 1100 removing him from office as Branch President. Statements and arguments on behalf of both Fontana and Branch 1100 were submitted for NALC review.

No hearing was held by the NALC's Committee on Appeals concerning Fontana's appeal, nor was one required under the CGSFB. The Committee does not conduct a *de novo* review of the matter; rather it decides if the Branch's decision violates the NALC Constitution or the Branch's By-laws. In addition, the Committee reviews whether the Branch used the proper Constitutional procedure in reviewing the charges and considers whether there is sufficient basis to support the Branch's decision. In the case of Fontana's appeal from his removal from

office, the Committee on Appeals issued its written decision in NALC Appeal #24 on November 9, 1993, as follows:

> Based on an examination of the evidence in the record, the Committee on Appeals finds that [Fontana's] appeal is without merit. The Committee finds that the Branch, through its investigation committee, sufficiently carried out all its duties under Arrticle 10 of the CGSFB. In particular, the [investigatory] committee's presentation of the facts to the Branch, as well as the Branch's final decision on this issue, was not contrary to the obligations prescribed in the NALC National Constitution or the CGSFB.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Brother Fontana be, and hereby is, denied.

2. *Charges Resulting in Fontana's Suspension from Membership; Fontana's Appeal Upheld.*

On August 9 and 10, 1993, respectively, Branch 1100 members Bruce J. MacDuffee and Michael Rotcher filed a series of additional internal union charges against Fontana, this time seeking Fontana's expulsion or suspension from membership in Branch 1100. The charges were heard by Branch 1100's membership at a September 14, 1993 meeting, where the Branch membership voted to sustain a number of the charges against Fontana, but deferred imposing a penalty until its October 7, 1993 meeting. At the October 7 meeting, the membership voted to suspend Fontana's union membership through May 30, 1995.

In early October 1993, Fontana filed an internal union appeal with the NALC Office of Appeals from the September 14, 1993 action of Branch 1100, finding him guilty of the allegations set forth in the charges that

Branch 1100 members MacDuffee and Rotcher had filed against him in August 1993. On or about October 26, 1993, Fontana filed an appeal with the NALC Office of Appeals from the October 7, 1993 action of Branch 1100 suspending him from membership.

Again, no hearing was held by the NALC's Committee of Appeals concerning Fontana's appeals, nor was one required under the CGSFB. Again, the Committee did not conduct a *de novo* review of the matter; rather it decided if the Branch's decision violates the NALC Constitution or the Branch's By-laws and reviewed whether the Branch used the proper Constitutional procedure in reviewing the charges and considered whether there is sufficient basis to support the Branch's decision. In the case of Fontana's appeals from his suspension from membership, the Committee on Appeals issued its written decision in NALC Appeal #35 on November 10, 1993, as follows:

> Based on an examination of the evidence in the record, the Committee on Appeals finds [Fontana's] appeal should be sustained. Every member has the right under the Constitution to file internal union charges. Thus, the Committee on Appeals finds that it is contrary to the purposes of the constitution to suspend membership on this basis. Secondly, while Mr. Fontana's other alleged conduct may be grounds for discipline or removal from his position, such conduct is not an appropriate basis for suspension of membership.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Brother Fontana should be, and hereby is, upheld.

Although the NALC uheld Fontana's appeals, his suspension from membership remained in effect due to his

failure to fulfill his union dues obligation during the pendency of his appeal. Pursuant to Article 10(5) of the CGSFB, a member is required to fulfill his dues obligation even during periods of suspension. Failure to do so results in a forfeiture of membership rights.[3] Fontana has admitted that even suspended members are obligated to pay dues. Yet, upon his removal from office as President in May 1993, Fontana had ceased paying his union dues. Even after November 10, 1993, when the NALC had overturned his suspension of membership based on the merits of the internal union charges presented against him, Fontana did not bring his union dues obligation current. Therefore, under the NALC's reasonable and uniform membership rules, Fontana forfeited his right to reinstatement of membership.

B. The Charges and Appeals Regarding Johnson

1. Richard Felde's August 10, 1993 charge against Johnson.

On or about August 10, 1993, Branch 1100 member Richard Felde filed an internal union charge against Johnson based on Johnson's support of Fontana's many charges aaginst other Branch 1100 members in the period commencing February 1993.[4] On September 14, 1993,

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3 With regard to the penalties for non-payment of dues, Article 10(5) references Article 7(4) of the CGSFB, which states, in pertinent part: Any member failing to pay any fine, assessment or monthly dues within thirty (30) days after the same shall become due, shall forfeit his/her membership. He/she shall vacate any office held in the Branch or Association, effective on the date of such forfeiture. He/she shall not be entitled to vote in the Branch, and he/she shall not be eligible for nomination or election to any office . . . .

4 The August 10, 1993 Felde Charge alleged, in pertinent part, that Johnson had "aided and abetted Basilio Fontana in his disruptive campaign against the stated purpose of Branch 1100. You

Branch 1100's membership voted to sustain the Felde Charge against Johnson, but deferred imposing a penalty until the General Membership Meeting scheduled for October 7, 1993.

2. Bruce MacDuffee's August 9, 1993 charge against Johnson and Michael Rotcher's August 10, 1993 charge against Johnson.

On or about August 9, 1993, Branch 1100 member Bruce MacDuffee filed an internal union charge against Johnson, claiming violations of Article 1, § 2 of the Branch 1100 By-laws [5] and Article 10(8) [perfidy] of the CGSFB, and alleging, *inter alia*, that Johnson had breached her trust to the Branch membership by aiding and abetting Fontana in the pursuant of his internal union charges against other elected officers of Branch 1100.[6]

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have repeatedly and continued to help him in the filing of false and frivolous charges against members of Branch 1100. The time and resources of the Union have been wasted by your irrational and irresponsible conduct. It is obvious to me that you are not working in the memberships' best interest and in fact are trying to destroy the union."

According to the September 14, 1993 Branch 1100 Investigating Committee Report into Felde's Charge against Johnson, Fontana had filed 34 individual charges against fellow unionists since February 1993.

[5] Article 1, § 2 of the Branch 1100 By-laws provides: "The object of this Branch is to unite all letter carriers in the area who are eligible for membership under Article III, Section 2 of the [NALC] Constitution, into one harmonious body for their mutual benefit and to assist the [NALC] in its efforts to improve the Postal Service."

[6] Specifically, the August 9, 1993 MacDuffee Charge alleged:

> Your actions of filing charges, and/or aiding and abetting and/or conspiring to file charges, against other elected officers of Branch 1100, has caused serious disharmony to the entire membership of Branch 1100 and the [NALC]. These actions have also contributed to a large financial burden on the Branch

Then, on or about August 10, 1993, Branch 1100 member Michael Rotcher filed another internal union charge against Johnson, claiming violations of Article 14, § 3 of the NALC Constitution and Article 10(1) and (8) [perfidy] of the CGSFB, along the same lines as the charges brought by Felde and MacDuffee.[7]

The Branch 1100 Investigating Committee Reports into MacDuffee's and Rotcher's Charges against Johnson found that grounds existed for upholding all charges except the claims of "perfidy." On October 7, 1993, Branch 1100's membership voted to sustain the MacDuffee and Rotcher

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funds by having to compensate each impartial investigative committee member every time new charges were instigated by you or your co-conspirators, in an obvious attempt to deplete these funds. You have used your position and influence, and you have made promises of Vice Presidential positions to members, in exchange for their support of your actions and to carry out your vendetta against the remaining elected Branch officers.

[7] The Rotcher Charge alleged, in pertinent part:

You [Johnson] have acted in collusion with and in support of Basilio Fontana in his efforts to destroy the Branch. This has severely hampered the ability of the Branch to conduct business, brought unnecessary expense, and seriously impaired its credibility. Your actions and statements have very nearly sabotaged policy directives and decisions made by the Branch for the good of the Branch. You have exceeded your authority and acted without and contrary to the authorization of the Executive Council and membership. You have ignored or refused to abide by the instructions of the President, the Executive Council, and the membership. You have continually subverted the will of the membership and publicly claimed that you do not recognize its authority in Branch meetings. You have violated your oath of office. You have been derelict in your duties as a Vice-President and failed to properly represent members of this Branch. You have attempted to turn other members against the Branch through lies, misrepresentation of the facts, and political campaigning on so-called "station visits." You have used your office and your influence with Basilio Fontana for political purposes.

charges against Johnson, and folowing up on its September 14, 1993 action on the Felde charge as well, imposed a penalty on Johnson of suspension of Union membership through May 30, 1995.

3. ***NALC response to Johnson's appeals concerning suspension of Union membership.***

On or about October 4, 1993, Johnson filed an internal union appeal with the NALC Office of Appeals from the September 14, 1993 action of Branch 1100, finding her guilty of the allegations set forth in the August 10, 1993 Felde Charge. Both Johnson and Branch 1100 submitted statements and arguments to NALC for its review.

On or about October 26, 1993, Johnson filed internal union appeals with the NALC Office of Appeals from the October 7, 1993 action of Branch 1100, suspending her membership until May 30, 1995 (although Johnson erroneously referred to such action as an "expulsion"), based upon the allegations set forth in the August 1993 MacDuffee and Rotcher Charges against her.

No hearing was held by the NALC's Committee on Appeals concerning Johnson's appeals, nor was one required under the NALC Constitution or the CGSFB. As with Fontana, the Committee on Appeals was not required to conduct a *de novo* review of the matter; rather it was to decide if there was a sufficient basis to support the decision of the Branch. In response to Johnson's October 1993 appeals, the Committee on Appeals issued its written decision on November 10, 1993, stating in pertinent part:

> Based on an examination of the evidence in the record, the Committee on Appeals finds [Johnson's] appeal should be sustained. Every member has the right under the Constitution to file internal union charges. Thus the Committee on Appeals finds that

> it is contrary to the purposes of the Constitution to suspend membership on this basis. Secondly, if proven, Ms. Johnson's performance of work outside the scope of her duties while on union time may be grounds for discipline or removal from her position, however, this is not an appropriate basis for suspension of membership.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Sister Johnson should be, and hereby is, upheld.

As with the Fontana charges and appeals, although the NALC upheld Johnson's appeals, her suspension from membership remained in effect because she failed to fulfill her union dues obligation during the pendency of her appeals. Upon her suspension from union membership, Johnson ceased paying her union dues. Even after November 10, 1993, when the NALC had overturned her suspension of membership based on the merits of the internal union charges presented against her, Johnson did not bring her union dues obligation current. Therefore, under the NALC's reasonable and uniform membership rules, Johnson forfeited her right to reinstatement of membership.

REASONS FOR DENYING THE WRIT

I. THE ISSUE WAS NOT RAISED ON APPEAL AND THUS IS NOT PROPERLY BEFORE THE COURT

On appeal to the Ninth Circuit, Petitioners asserted for the first time that, in addition to the matter of the NALC's alleged ratification of the acts of the Branch, there was a triable issue as to whether the NALC directly violated Petitioners' due process rights. The Ninth Circuit, appropriately, did not rule on the issue. An appellate court will not generally consider an issue that was not passed on below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976);

Crawford v. Lungren, 96 F.3d 380, 389 n. 6 (9th Cir. 1996) [issues raised for the first time on appeal are ordinarily not considered on appeal.]

Although Petitioners alleged in their respective complaints that their due process rights were guaranteed by both the NALC's Constitution and the LMRDA, they had long ago waived any claims of "direct" violation of such rights by the NALC, if such claims ever existed. In the District Court, Petitioners admitted that their claims against the NALC were based strictly on a theory of "ratification"—*i.e.*, the NALC's alleged ratification of the acts of the Branch Defendants. Petitioners have not appealed the Ninth Circuit's ruling that the NALC did not ratify the Branch's actions. Therefore, there is no basis for this Petition and certiorari should be denied.

Petitioners did not argue in the District Court, nor in their briefs on appeal to the Ninth Circuit, that the NALC had some obligation to conduct an investigation beyond what is required by the NALC Constitution. The LMRDA leaves it to labor unions to develop their own rules and regulations for their internal management, so long as those rules and regulations are reasonable. 29 U.S.C. § 431. Petitioners have not challenged the NALC's Constitution as being unreasonable or deficient in any way. Petitioners have only challenged the conduct of the NALC and Branch Defendants within the framework of the NALC Constitution or the LMRDA.

II. EVEN IF THE ISSUE WAS ADDRESSED ON APPEAL, SUMMARY JUDGMENT WAS PROPER AND THE DECISIONS BELOW SHOULD BE AFFIRMED

In both the District Court and the Ninth Circuit, Petitioners asserted that their LMRDA "free speech" claims, were based on the NALC's alleged failure to grant the

October 26, 1993 appeals and overturn the Branch's action in sustaining the August 1993 MacDuffee and Rotcher Charges against Fontana and Johnson. Even assuming, *arguendo*, that the NALC failed to respond to the October 23, 1993 appeals, the NALC's lack of response still does not constitute ratification of the underlying action of which Petitioners complained.

As stated in *Rodonich v. Housing Wreckers Union Local 95*, 817 F.2d 967, 973 (2nd Cir. 1987) on which both Petitioners and the NALC relied below, "ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it." Here, the NALC had previously evidenced an intent to overturn Petitioner Johnson's suspension from membership based on the Felde charges and Petitioner Fontana's original suspension based on the MacDuffee and Rotcher charges brought against him. Petitioners contend that the NALC failed to respond to their appeals in connection with the October 7, 1993 Branch actions (which were substantially identical to the earlier appeals from the Branch's September 14, 1993 actions), that is, that the NALC was silent. However, taking into account both the NALC conduct vis-a-vis the earlier charges as well as the MacDuffee and Rotcher charges, there is *no evidence of an intent to ratify* the Branch's October 7, 1993 action concerning the MacDuffee and Rotcher charges. Rather, there is *substantial evidence of an NALC intent to overturn the Branch's actions.* Since Petitioners were required to establish such intent by "clear and convincing evidence," *Rodonich, supra,* 817 F.2d at 972-973, and could not do so even by a preponderence thereof, the NALC submits that both the District Court and the Ninth Circuit were correct in finding that the NALC did not "ratify" the Branch's action.

Where the Petitioners have shown no obvious or egregious error in the findings of the District Court and Court of Appeals, review by this Court is not warranted. The Supreme Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Berenyi v. Information Director*, 385 U.S. 630, 635 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-409 (1962); *Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). This Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Accordingly, there is no reason for the Court to grant certiorari in this case. The Petition should be denied.

III. THE ISSUE RAISED IN THE PETITION COULD HAVE NO IMPACT ON THE ULTIMATE OUTCOME FOR PETITIONERS AND IS THEREFORE MOOT

Petitioners do not question the *result* of the decisions below. They do not challenge the judgments entered against them. Rather, they seek a fresh bite at the apple by arguing that the Ninth Circuit erred in holding that a single, non-dispositive, issue was not addressed on appeal.

Revisiting the question of whether the NALC adequately handled Petitioners' appeals will have no effect on the outcome of this litigation. It is undisputed that Petitioners were ultimately expelled from the NALC for failing to pay membership dues while their internal union appeals were pending.[8] Petitioners have *never* questioned the

[8] The Ninth Circuit reversed the District Court's grant of summary judgment to Branch 1100 *only* on the ground that the charges brought against Fontana and Johnson were sufficiently specific to comply with § 411(a)(5) of the LMRDA. In the District Court, the Honorable Consuelo B. Marshall directly addressed Johnson's

NALC Constitution's requirement of dues maintenance, nor their resultant forfeited membership. The matter has therefore become moot.

"The test for mootness . . . is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches which might remain deeply engaged with the events of the litigation.) *Air Line Pilots Assn., Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990), *citing, North Carolina v. Rice*, 40 U.S. 244, 246 (1971). If granting the relief sought would make no difference to those interests, then the court is not really deciding a "case" and is therefore exceeding the power conferred on it by Article III of the U.S. Constitution. *Air Line Pilots Assn.*, 897 F.2d at 1396. While it is usually possible to "conjure up a set of facts under which the relief sought would make a difference" to the party seeking relief, if the relief would make only little difference, the case should be declared moot and relief withheld. *Id.*

Such is the case here. Both Fontana and Johnson ceased making membership dues payments after their appeals were filed. Regardless of the outcome of their appeals to the NALC, Petitioners' failure to pay dues was cause for suspension, and expulsion, from the Union. Neither Johnson nor Fontana ever made any effort to cure the delinquency in their dues payments. They were appropriately expelled from the Union for non-payment of dues. Even if this Petition is granted, and the Peti-

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disqualification from office for failuure to pay dues: "Evidence also shows that after NALC upheld her appeal and overturned the Branch's suspension of her mmebership, Johnson had ample opportunity to bring her membership obligations current and reinstate her membership." (*see* App. to Petition at 37; *see also*, Findings of Fact 22-24, App. at 33-34 and, with regard to Fontana, *see*, Finding of Fact 18, App. at 14.).

tioners could prevail on the merits, there is no relief that could overcome their knowing and voluntary failure to retain their membership status in the NALC. Petitioners themselves were ultimately the cause of their expulsion from the Union. The decisions below should therefore be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent NALC respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

E. JEAN JOHNSON and BASILIO FONTANA,

Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENT, NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners E. Jean Johnson and Basilio Fontana submit their Reply Brief to Respondent National Association of Letter Carriers, AFL-CIO's ("NALC") Brief in Opposition to Johnson and Fontana's Writ of Certiorari. NALC argues it responded to several appeals made by Johnson and Fontana prior to the October 26, 1993 (submitted by Branch 1100 to Respondent NALC on November 29, 1993)[1] appeals it did not respond to and that therefore NALC evidenced an ***"intent to overturn the Branch's actions"*** on those appeals to which it did not respond. NALC asserts this theory even though the only one appeal from Johnson and one appeal from Fontana were overturned by Respondent. Those appeals were from Branch actions based on the **Felde charges only.** NALC argues that the appeals made by Johnson and Fontana from Branch actions, first expelling them based on the Rotcher charges and then suspending them on the MacDuffee charges in the same meeting, were for suspensions only, entirely

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[1] Article 11 of the CGSFB provides in pertinent part:

Section 2. When an appeal from the action of the Branch is taken, the following rules must be observed:

First: The appeal must be in writing and filed with the recording secretary of the Branch, together with any written testimony, arguments and briefs, within twenty days from the date of the Branch meeting at which the decision to be appealed from was made.

* * *

Third: The Branch shall then be allowed twenty days to prepare its reply which shall be in writing with the seal of the Branch attached thereto.

A copy of this reply shall be immediately transmitted by the recording secretary to the appellant. The recording secretary shall also immediately transmit the appeal, together with all testimony, arguments, briefs and evidence submitted by the appellant and the reply of the Branch thereto via registered mail, to the Chairman of the Committee on Appeals of the National Association.

ignoring the expulsions. Thus, Respondent NALC completely avoids and fails to address the October 26, 1993 appeals (submitted to Respondent NALC on November 29, 1993) of Johnson and Fontana for being **expelled from union membership** based on the Rotcher and MacDuffee charges.[2] (For the October 26, 1993 appeals, see Appellant Johnson ER, Vol. I, pp. 184 & 212; for the November 29, 1993 submission to NALC, see Appellee NALC SER, Vol. III, pp. 770 & 793.[3]) As soon as Petitioners were expelled on October 7, 1993, the suspension penalties on the Felde and MacDuffee charges were ineffective, moot and superseded by the expulsions. (See Appellant Fontana ER, Vol. I, pp. 132, 133, 134, 135.)

NALC argues that Johnson and Fontana were expelled for failure to pay union dues as suspended members, continuing to ignore the fact that both petitioners were expelled from union membership on October 7, 1993 and were no longer required to pay any union dues. Respondent supports this contention by referencing the findings of fact made by the District Court. These findings do not address the expulsion of either Johnson or Fontana made on October 7, 1993 from which they appealed and never received a response.

Respondent NALC's argument regarding ratification is irrelevant to the issue presented in the Writ for Certiorari and will not be discussed in this reply brief. Further, in the Writ, Petitioners Johnson and Fontana are not addressing or calling into question what kind of investigation is required of Respondent NALC by its constitution and the LMRDA, just that a review be done in accordance with the requirement of providing the appealing union member with procedural due

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[2] Contrary to Respondent NALC's assertion in Footnote 8, p. 17 of its opposition brief, the Ninth Circuit reversed the District Court's grant of summary judgment as to Branch 1100 on the ground that the charges made by Felde, Rotcher and MacDuffee were ***insufficiently specific*** to comply with LMRDA, 29 U.S.C. Sec. 411(a)(5).

[3] Reference to ER is Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals. Reference to SER is Supplemental Excerpts of Record filed in the appeal to the Ninth Circuit District Court of Appeals.

process. The fact that Petitioners did not argue some obligation of the NALC to conduct a certain kind of investigation is wholly irrelevant to Respondent NALC's obligation to review and respond to appeals as required.

None of these arguments address the issue presented in the Writ for which Petitioners seek review, that they were denied the procedural due process guaranteed them by the NALC constitution and the LMRDA, and are, therefore, irrelevant. All of these arguments should fail for reasons discussed below.

First, the issue presented in the Writ by Johnson and Fontana deals with the requirement of the NALC to respond to all appeals as required by its constitution and the LMRDA. The "intent to overturn the Branch's actions" is not a valid factor allowing a waiver of the requirements found in the NALC constitution, the LMRDA or any case law. There is no such theory of "intent".

Second, by avoiding any discussion of expulsion (as it has done throughout this entire litigation) and selecting facts favorable to its theory of expulsion based on non-payment of dues, Respondent NALC hopes to direct belief of the Court that Johnson and Fontana were merely suspended by Branch 1100 based on all the charges made by Felde, Rotcher and MacDuffee and were thereby required to continue paying union dues. This simply was not the case.

Third, NALC's argument that Johnson and Fontana were expelled for failure to pay union dues and that the Writ is moot is not supported by the evidentiary record and again, is irrelevant to the issue raised in the Writ.

Petitioners believe they are obligated to the Court to point out in this reply brief any perceived misstatements made by Respondent NALC in the opposition brief as stated in *Supreme Court Rule 15(2).*

I. ARGUMENT

A. Prior Responses To Appeals Or Any Evidence Of An "Intent To Overturn The Branch's Actions" Is Irrelevant.

NALC describes various charges against Fontana to remove him as President and its response to his appeal from that removal from office. There is no explainable reason for Respondent to describe, in detail, each and every charge resulting in this removal since none of this information is relevant to the issue stated by Petitioner in the Writ, that failure to respond to appeals is a violation of Petitioner's due process rights. This information actually shows that Respondent NALC responds to the appeals it chooses to and shows its intent to support Branch 1100 actions because it denied that particular appeal and supported the Branch action of removal from office. (Respondent's Brief in Opposition, p. 8.) It is clear from NALC's discussion that it recognizes its duty and legal obligation to respond to all appeals as part of its due process requirement owed to all NALC union members.

At no point in the opposition brief does Respondent address its failure to respond to the October 26, 1993 (submitted by Branch 1100 to Respondent NALC on November 29, 1993 for review) appeals from expulsion made by Johnson and Fontana. Nor, does it deny such failure to respond. Respondent, instead, alleges only suspensions.[4]

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[4] It should be noted that NALC mistakenly represents that the appeal Fontana made from Branch 1100 actions taken on September 14, 1993 was based on the MacDuffee and Rotcher charges when, in fact, it was based on the Felde charges only for which the Branch suspended his membership. (The same occurred to Petitioner Johnson.) This is explained and supported in the Petitioner's Writ of Certiorari, p. 4 and p. 5. The Branch 1100 expulsions of Johnson and Fontana were based on the Rotcher charges and that expulsion did not take place until the October 7, 1993 Branch meeting. NALC's representation that Fontana ceased paying his union dues at any time is an egregious misrepresentation regardless of the District Court's finding of fact. (Where that finding of fact came from Petitioners have no idea since there is nothing in the evidentiary record to support such a

The failure of Respondent to respond to the appeals left Petitioners expelled from union membership permanently and irrevocably thus denying Petitioner Johnson her livelihood and Petitioner Fontana the right to run again for union office.

Finally, Respondent presents no legal support or legal precedent for the theory of "intent" as sufficing in place of a response to an appeal. The most telling failure and evident irrelevance of this theory is the fact that even Branch 1100 did not get it ("the theory"). Branch 1100 has never acknowledged recognition of any "intent" on the part of Respondent NALC to overrule the Branch's actions in expelling both Petitioners. Quite the contrary, the record shows that Branch 1100 believes its action of expulsion against Johnson and Fontana on October 7, 1993 was valid and supported by the NALC since it did not receive a response. Consequently, Petitioners were treated as expelled members by the Branch beginning October 7, 1993. It is undisputed that neither Johnson nor Fontana were expelled before that date or at any time in 1993.

Any assertion by Respondent that the response on November 10, 1993 was a response to all of the appeals (Felde, Rotcher and MacDuffee) is again, a misrepresentation of fact. Respondent NALC, in its argument before the Ninth District Circuit Court of Appeals admitted it did not respond to all of the appeals. (See Petition for Writ of Certiorari, App. 69 and 70.) The November 10, 1993 response upheld Johnson's and Fontana's appeals from Branch actions of suspension based on the **Felde charges only.** By referring to "appeals" in general, Respondent hopes to confuse and mislead the Court as it did at the District Court level and the

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contention except a self-serving declaration made by one of the defendants with no support of any kind.) Fontana never ceased paying his dues during the entire time in question. Fontana never received any letters informing him of being expelled for non-payment of dues and no date of expulsion has ever been identified by the Branch or Respondent NALC simply because it did not happen. Expelled members are not required to pay dues as they are non-members of the union.

Ninth Circuit Court level. The following is the undisputed time line with supporting references in the record:

August 10, 1993	Johnson and Fontana are allegedly served with the Felde charges and are served with the Rotcher and MacDuffee charges. (Appellee Branch 1100 SER, Vol. III, pp. 471, 472, 474, 475, 476, 478.)
Sept. 14, 1993	Petitioners are **suspended** from membership based on the **Felde** charges. (Appellant Johnson ER, Vol. I, pp. 243-244, & 245.)
Oct. 4, 1993	Johnson and Fontana file an appeal to the suspension action taken by the Branch based on the **Felde charges only**. (Appellee NALC SER, Vol. III, pp. 650 & 704.)
Oct. 7, 1993	Johnson and Fontana are **expelled** by the Branch based on the **Rotcher charges** and suspended by the Branch based on the MacDuffee charges. (Appellant Fontana ER, Vol. I, pp. 132, 133, 134 & 135.)
Oct. 25, 1993	A letter is mailed to Johnson notifying her she is arrears in dues.[5] (Appellee Branch 1100 SER, Vol IV, p. 708.)
Oct. 26, 1993	Johnson and Fontana's **Felde appeals** are sent to Respondent NALC by Branch 1100 for review. (Appellant Johnson ER, Vol. II, p. 404; Appellant Fontana ER, Vol. II, p. 492.)
Oct. 26, 1993	Johnson and Fontana submit their appeals from the Branch action of **expulsion based on the Rotcher charges** and suspension based on the MacDuffee charges to the Branch. (Appellee NALC SER, Vol. III, pp. 770 & 793; Appellant Johnson ER, Vol I, p. 184 & 212.)

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[5] Fontana never received any such letter, nor did he ever receive notice from the Branch that he was expelled for non-payment of dues. There is no evidence in the record supporting this alleged fact. The record shows Fontana paid his dues via withholding from his retirement check throughout the entire time in question.

Nov. 10, 1993	Johnson and Fontana receive a response from Respondent NALC sustaining their appeals from suspension based on the **Felde charges only**. (Appellee NALC SER, Vol. III, pp. 831, 832, pp. 829, 830.)
Nov. 29, 1993	Branch 1100 sends Johnson and Fontana's appeals from Branch action based on the **Rotcher charges (expulsion)** and the MacDuffee charges (suspension) to Respondent NALC for review. (Appellant Johnson, ER, Vol. I, p. 202; Appellant Johnson, ER, Vol. II, p. 420.)
March 25, 1994	A letter is mailed to Johnson from the Branch notifying her she has been expelled for non-payment of dues.[6] (Appellee Branch 1100 SER, Vol. IV, p. 710.)

B. Respondent NALC Fails To Discuss Petitioners' Expulsions.

It is clear to these Petitioners that Respondent NALC discussed only Petitioners' suspensions because suspended members are required to pay union dues while suspended. That being the case, Respondent could argue two points, (1) that Petitioners were expelled for not paying dues and (2) since they were allegedly expelled for non-payment of dues, Petitioners would have no effective remedy and Respondent,

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[6] It is undisputed that prior to March, 1994, no Branch 1100 union member had ever been expelled for non-payment of dues even though some, including national union officers, were months and years in arrears and in some cases, over a thousand dollars in arrears. (Appellant Johnson, ER, Vol. II, pp. 436 through 464.) Some of the dues notices contained a note, "We will not drop you for your information only." (Johnson ER, Vol. II, p. 446.) A union cannot enforce dues requirements in a discriminatory fashion against certain members, while other members are allowed to fall behind on their payments for protracted periods with impunity. *Lang v. Consolidated Rail Corp.*, 579 F. Supp. 705, 709 (1984); *Burch v. IAM and Aerospace Workers, AFL-CIO*, 337 F. Supp. 303, 306 (9th Cir. 1971). Such violations constitute a violation of the LMRDA, 29 U.S.C. Sec. 411(a)(1).

then had no obligation or legal duty to respond to Petitioners appeals.

The failure to address the fact of the expulsions on October 7, 1993 by either affirming or denying them is crucial to the credibility of Respondent NALC. The obvious reason for this failure to discuss the expulsions is that if Petitioners Johnson and Fontana were expelled rather than suspended on October 7, 1993, they could not have been expelled for non-payment of dues. There is no provision in the NALC constitution or in any law or case that gives the union any control over an expelled member. In this case, Branch 1100 dissolved the union-member relation with Petitioners on October 7, 1993. Up to and including October 7, 1993, Petitioners were considered members of the NALC. After October 7, 1993 Branch 1100 and the NALC had no more control over the former members than it had over the man in the street. Petitioners could not have been expelled for non-payment of dues because they were already expelled.[7]

It is clear that (1) Respondent NALC did not respond to Petitioners' appeals from the Rotcher expulsion and the MacDuffee suspension submitted to it on November 29, 1993, (2) Respondent's failure to respond resulted in a violation of Petitioners right to procedural due process required of Respondent by its constitution and by the LMRDA, (3) Respondent knew it was required to respond and did not do so, and (4) Respondent NALC knew it did not have to provide procedural due process because Petitioners would have no viable remedy against it for ignoring the law.

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[7] It should be observed that nowhere in Respondent's opposition brief does Respondent deny receiving the appeals by Petitioners from expulsion nor does Respondent deny the fact that it did not respond to those appeals made by Petitioners. To the contrary, by making the suspension/failure to pay dues argument, Respondent tacitly admits it received the appeals and did not respond.

C. Respondent's Argument That Petitioners' Were Expelled For Failure To Pay Dues Rendering Petitioners' Writ For Certiorari Moot Is Irrelevant.

Respondent's argument regarding any failure of Petitioners to pay dues has been discussed and is a factual argument **entirely irrelevant** to the issue in Petitioners' Writ. The Writ is clearly based on Respondent NALC's complete failure to respond to their appeals from expulsion from union membership by Branch 1100 on October 7, 1993. If Respondent alleges that, instead, Petitioners were expelled for non-payment of dues, the question then arises, when were Johnson and Fontana expelled for non-payment of dues? And, arguendo, if they had been expelled for non-payment of dues, prior to October 7, 1993, there would have been no appeals in October or November, 1993. In fact, Respondent NALC did not and cannot give any dates prior to October 7, 1993 or indeed, anytime in 1993, when Petitioners were expelled for non-payment of dues. Finally, Respondent NALC has provided no provision in its constitution, no Federal law, no case that relieves it of its legal, mandated duty or gives them a right to subvert the law and not provide Petitioners with their rights to due process even if they had been expelled members. **Thus, the dues issue raised by Respondent has absolutely no bearing on the issue petitioned for review in the Writ and the entire argument should be rejected.**

Respondent's argument that the issue raised in the Writ for Certiorari is moot is misplaced and irrelevant. Again, this argument is based on the allegation that Petitioners were expelled for non-payment of dues. It is evident that Petitioners' Writ is not moot. The injury suffered from the expulsion on October 7, 1993 continues to this day and into the future for as long as each Petitioner would have remained members of the Union. Had Respondent NALC appropriately responded to Petitioners' appeals, Branch 1100 would have had to remove the expulsions and both Petitioners would still be union members today. NALC union membership meant a living for Johnson and probable union office for Fontana. As stated by Respondent, the test for mootness is whether the relief sought would, if granted, make a difference to the legal

interests of the parties. *Airline Pilots Assn., Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990), citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Both Petitioners should have a means to seek the economic damages they have suffered against Respondent NALC's for failure to respond to their appeals.

The ability to hold a national union liable for violation of its own constitution and the law is necessary for all union members in the United States. National unions should not be able to flaunt the law with impunity and disregard the law by taking the working union members' dues and then not providing those members with what the law requires. The issue raised in Petitioners' Writ is not moot.

II. CONCLUSION

Respondent NALC's entire opposition is factual argument that is irrelevant to the issue at hand. Petitioners are not seeking a review of the evidence or a discussion of specific facts, but rather a review of the law requiring national unions to provide procedural due process to its members and at the same time, does not hold a national union accountable to its members for violation of the law. Union members have no feasible method of holding national unions accountable for violations of their rights guaranteed by the LMRDA.

For all of the foregoing reasons, this Court should reject Respondent NALC's arguments and grant Petitioners Johnson and Fontana's Petition for Writ of Certiorari.

Respectfully submitted,

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